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The European Commission's Solution to Catch Nascent Acquisitions

A Legal Study of the New Approach to Article 22 of the EU Merger Regulation

Evelina Åsberg Siska

Department of Law
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Abstract

The Commission has implemented a new approach to Article 22 of the EUMR, which enables them to accept referrals from Member States in merger cases where concentrations do not surpass national thresholds, thereby falling outside the scope of scrutiny for national competition authorities. The main objective of this thesis is to critically analyze the new approach adopted by the Commission and explore alternative competition tools.

The new approach resulted from a chain of events that started with an economic study that uncovered a trend of established pharmaceutical companies buying out nascent firms that did not meet regulatory thresholds, leading to anticompetitive practices aimed at eliminating potential competitive threats. This thesis finds that it was necessary for the Commission to devise an effective reviewability mechanism to enable examination of concentrations involving nascent undertakings with competitive and innovational potential to maintain effective dynamic competition in new economy sectors. However, the approach used to achieve this aim is questionable from numerous perspectives. The Illumina/Grail judgment and the Article 22 Guidelines, which establish the new regulatory approach, have faced substantial backlash due to unclear requirements and concerns surrounding, *inter alia*, the principle of subsidiarity, legal ambiguity, and legitimate expectations. Despite this, the Commission is authorized to modify its Article 22 approach at its discretion, provided that the approach complies with the EUMR.

This thesis uncovers that the legality of the new approach, as described in the *Illumina/Grail* judgment and Article 22 Guidelines, can be challenged because (1) historical documents indicate that Article 22 referrals were meant to constitute a transfer of power from NCA:s to the Commission, (2) the Illumina/Grail judgment violates the one-stop-shop principle articulated in the recitals of the EUMR, (3) the legal uncertainty caused by the ambiguous criteria in the Article 22 Guidelines may have a detrimental impact on innovation in the market by decreasing appropriability without a corresponding increase in contestability, possibly rendering fewer synergetic mergers, (4) the interpretation presented in the Illumina/Grail judgment may cause fragmentation within the EU market in a way which is incompatible with the principle of subsidiarity and equality between Member States.

Ultimately, this thesis proposes revising and specifying the Article 22 Guidelines to align with fundamental principles of EU law and the EUMR. This would involve adopting a more targeted approach to reduce legal uncertainty for undertakings. Furthermore, the thesis recommends altering and specifying the system

for voluntary notifications and early indications procedures to enhance legal certainty for concentrations that might fall under the widened scope of Article 22.

Abbreviations

CJEU	Court of Justice of the European Union
DMA	Digital Markets Act
EU	European Union, European
EUMR	EU Merger Control Regulation
FTC	Federal Trade Commission
GC	General Court of the European Union
IP	Intellectual property
M&A	Mergers and acquisitions
MCED	Multi-cancer early detection
NCA	National competition authority
NGS	Next Generation of Sequencing Systems
R&D	Research and development
OECD	Organization for Economic Cooperation and Development
SCA	Swedish Competition Authority
TEU	Treaty of European Union
TFEU	Treaty on the Functioning of the European Union

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1 Introduction

1.1 Background

The primary goal of the European Union ('EU') competition law is to safeguard the welfare of consumers.[1] This can be accomplished, *inter alia*, by ensuring dynamic markets that foster innovational and technological progress.[2] As scientific advances continue to expand technical boundaries, innovation has never been more critical than it is today. The scope of competition law is extending beyond the mere provision of improved goods for consumers. Greater emphasis is placed on prioritizing the production of products that positively affect major global issues, including the advancement of life-saving medicines and green technology. Therefore, dynamic competition has become increasingly significant in the modern age.[3]

The rate of innovational evolution within a given market partly rests on the provenance of start-ups.[4] Innovational pressure is applied when a nascent firm enters a market with an advanced product at lower prices or superior quality. Thus, it encourages established competitors to improve their goods.[5] One of the three pillars utilized to maintain a dynamic market is the regulatory framework for EU Merger Control Regulation (EUMR).[6] Generally, mergers generate dynamic efficiencies and permit company owners to sell their businesses to more prominent players with resources to continue the development of a new product, thus incentivizing innovation (henceforth known as the 'sell and exit' strategy). Indeed, mergers often increase the competitiveness of the EU industry, which is why concentrations between undertakings are typically approved.[7] However, the EUMR prohibits mergers with a high likelihood of causing lasting anti-competitive effects, which may significantly impede effective competition in the common market or a substantial part of it.[8] In the past, the innovational pressure applied by nascent firms has had a limited impact on EU merger control.[9] However, the

[1] Jones, A, Sufrin, B & Dunne N, *Jones & Sufrin's EU Competition Law: Text, Cases and Materials,* 7th edn., Oxford University Press, 2019, page 46.
[2] Ibid., page 8.
[3] For example, see EU's industrial Policy Provision in Article 173 TFEU.
[4] OECD, *Start-ups, Killer Acquisitions and Merger Control*, 2020, page 3, available at: <www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf>.
[5] Ibid.
[6] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[4] Recital para 4 EUMR.
[8] Ibid., para 5.
[9] OECD, *Start-ups, Killer Acquisitions and Merger Control*, page 3.

EU Commission ('Commission') has begun to review its merger control practices due to recent findings that indicate increased market concentrations within the EU market.[10] As a result, the scrutiny of certain mergers has intensified.[11]

The term 'killer acquisition' was coined in a study that identified a flaw in the regulatory framework for the assessment of mergers and acquisitions (M&A) by competition authorities.[12] Killer acquisitions represent a theory of harm that assumes that an incumbent acquiring a nascent firm can disrupt the development of a product that poses a potential competitive threat to its established business activity.[13] In addition, there are numerous closely related theories of harm concerning concentrations involving nascent firms due to their innovational importance.[14] These types of nascent firm transactions (hereafter referred to as 'nascent acquisitions') can be detrimental to consumer welfare due to the resulting decline in innovation, which may reduce choice, quality, and price. Importantly, concentrations involving a nascent business often lack an EU dimension due to the nascent firm's low revenues at the time of purchase. Therefore, nascent acquisitions often fail to meet the prerequisites of the *bright-line* test, rendering the concentration unreviewable by competition authorities.[15]

Subsequently, the Commission identified a way to review possible concentrations without an EU dimension through a broadened interpretation of Article 22 of the EUMR (hereafter 'Article 22'). Article 22 constitutes an exception to the EU-dimension rule and affords jurisdiction to the Commission upon referrals from Member States. The exception has conventionally been used restrictively by the Commission to aid Member States that lack merger control regulations or where the Commission is better placed to review a merger.[16] In April 2021, the Commission published the new Article 22 Guidelines (henceforth the 'Guidelines'), presenting a novel interpretation that enables the Commission to accept referrals of concentrations that fall outside the jurisdictional scope of existing national merger control regulations.[17] Shortly thereafter, the new approach premiered in the Illumina/Grail case after a referral from France, Belgium, Greece, Iceland, the Netherlands, and Norway.[18] The new approach was later confirmed

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[10] See, European Commission, 'Industry concentration and competition policy', Competition Policy brief Issue, 2021/02, ISBN: 978-92-76-43538-9.

[11] Vestager, M., *Merger control: the goals and limits of competition policy in a changing world*, Florence, Speech 9 of September 2022.

[12] Cunningham, C, Ederer, F, and Ma, S., *Killer Acquisitions*, [2021], Vol. 129, No. 3, Journal of Political Economy, pages 649-702.

[13] Ibid., page 650.

[14] OECD, *Start-ups, Killer Acquisitions and Merger Control*, page 10

[15] European Commission, 'Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation certain categories of cases', (Communication) OJ 2021/C 113/01, para 10.

[16] Jones, A, Sufrin, B & Dunne N, page 1096.

[17] European Commission, OJ 2021/C 113/01.

[18] None of which had national jurisdiction to review the merger under existing national merger regulations, See Vestager, M., *Mergers: Commission prohibits acquisition of GRAIL by Illumina,* Brussels, Press release 6 of September 2022, < https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7403>, accessed on 9th of February 2023.

by the General Court of Justice (GC) and is now appealed to the Court of Justice (CJEU).[19]

However, with great power comes great responsibility; the new construal of Article 22 has prompted apprehension as to whether the Commission has exceeded its prescribed authority because the new approach deviates from the Commission's traditional practice of solely accepting referrals where the concerned concentrations lie within the national jurisdiction of at least one of the referring Member States. Although this interpretation of Article 22 is not expressively forbidden, it grants the Commission significant authority in reviewing concentrations without an EU dimension. Therefore, the theme of my thesis concerns the legality of the Guidance and any merger decisions made as a result of a merger referral where the national law of the referring Member States does not allow for a concentration to be reviewed at a national level.

1.2 Purpose and Research Questions

The primary objective of the thesis is to assess whether the legal framework in the EUMR effectively enables the Commission to scrutinize nascent acquisitions that could harm dynamic competition in a manner that aligns with the underlying objectives of the EUMR. To achieve this purpose, the thesis will examine the competitive harmfulness of nascent acquisitions, outline and analyze the EU-dimension thresholds and corrective mechanisms, and critically analyse the new Article 22 approach. The secondary objective is to explore alternative options to the new Article 22 approach; therefore, the thesis will conclude with an inquiry into other competition tools available to enable scrutiny of nascent acquisitions.

The following research questions will be answered to accomplish these objectives:

1) What evidence is there that nascent acquisitions threaten innovation and dynamic competition?
2) Is the EUMR legal framework sufficient in enabling the Commission to review nascent acquisitions that can significantly impede effective competition in a given market?
3) Is the Commission's and GC's new interpretation of Article 22 compatible with the underlying objectives of the EUMR?
4) What alternative solutions are there to guarantee jurisdiction to review nascent acquisitions, and are any of these measures preferable over the new Article 22 approach?

1.3 Thesis Outline

The composition of the dissertation meticulously adheres to that of the research questions, where each chapter's primary objective is to address a particular

[19] Case M.10188, *Illumina/Grail*, Commission Decision of 6 September 2022.

research question. The second chapter of the thesis provides a detailed analysis of economic theories related to maintaining innovative markets, followed by an introduction to the concept of anti-competitive nascent acquisitions and an evaluation of their impact on dynamic markets. The economic theories presented in chapter two will serve as a benchmark in the analysis of the legal framework explored in this thesis. The following chapter offers an overview of the relevant legal framework in the EUMR and examines its effectiveness in capturing nascent acquisitions, including a thorough examination of Article 22 before and after the new Guidelines. In chapter four, the new approach is critically analyzed, via an in-depth examination of the Illumina/Grail judgment, to assess the legality and effectiveness in relation to the underlying objectives of the EUMR and the economic theory introduced in chapter two. In the fifth chapter of the thesis, carefully selected alternative competition tools will be examined and assessed on their effectiveness in enabling the Commission to scrutinize nascent acquisitions. Ultimately, recommendations will be provided on the most effective approach. Finally, the paper will end with concluding remarks.

1.4 Methods and Sources

The purpose of the dissertation is two-fold; (1) to determine the current legal situation (what is the law*),* and (2) to explore the consequences of this legal situation, followed by a review of alternative solutions (what should be law). Thereby, the essay will utilize three different methodologies: the EU Legal Method, the Method of Law and Economics, and the Legal Analytical Method. Although all methods will permeate every chapter, the EU Legal Method will play a pivotal role in determining the legal framework and analyzing the new interpretation of Article 22. In contrast, the method of Law and Economics and the Legal Analytical method will play an essential role in the analysis of the effectiveness of the new interpretation in relation to the legal framework surrounding EU-merger control and maintenance of dynamic competition and innovation in the Community market.

1.4.1 EU Legal Method

EU law constitutes an autonomous legal system that requires its own internal hierarchy of norms due to its two-tiered nature as international and national law and is therefore interpreted at national and supranational levels.[20] Consequently, the jurisprudence of the EU courts has developed a methodology over time based on the source structure of EU law, namely the EU Legal Method.[21] This method is ideal for identifying the current legal framework.

[20] Reichel, J, 'EU-rättslig metod*',* in Nääv, M & Zamboni, *Juridisk Metodlära*, 2nd edn., Lund, Studentlitteratur AB, 2018, page 109.
[21] Hettne, J & Otken Eriksson, I, *EU-rättslig metod, teori och genomslag i svensk rättstillämpning*, 2nd edn, Nordstedts Juridik, 2011, pages 34 -35.

The EU hierarchy of norms can be divided into three main groups: (1) primary law, (2) binding secondary law, and (3) non-binding secondary law.[22] The essay will utilize all three. It is, therefore, important to consider their legal value in the hierarchy of norms.

The legal validity of primary sources is supreme due to their direct link with the democratic decision-making process between Member States and their embodiment of the fundamental principles of EU law.[23] These include treaties, the Charter of Fundamental Rights, and general principles established by the CJEU.[24] Binding secondary sources of law consist of acts by which the EU exercises its competence, mainly the acts listed in Article 288 of the Treaty on the Functioning of the European Union (TFEU), such as regulations, judgments, decisions, and directives.[25] Non-binding secondary law (or soft law) encompasses guidance papers, notices, opinions, and other non-binding publications by officials within the EU apparatus.

The essay will primarily use binding secondary sources, namely the EUMR and case law. However, the EUMR can be interpreted in numerous ways. Therefore, the Regulation must be understood in the light of primary sources and using judgments of the European Court of Justice.[26] The key fundamental principles that are significant for this thesis include the principle of legal certainty, subsidiarity, equality between Member States and the one-stop shop.

The importance of soft law within the EU legal framework varies from institution to institution. However, the CJEU has recognized that competition guidelines and notices published by the Commission carry a certain legal force.[27] The Commission may shape policy within the legal framework of competition law, provided they operate within their margin of discretion.[28] However, the GC or CJEU can overturn the Commission's decisions if they go beyond the said discretion. Another source of significance is legal doctrine, which is not referred to in EU case law. However, it is well-known to be used by the CJEU behind the scenes.[29]

Article 19.1 of the Treaty of European Union (TEU) empowers the CJEU, GC, and specialized courts to ensure accurate interpretation and application of European law. Over time, the Court of Justice has adopted various methods to interpret the EU norms. Primarily they employ the literal interpretation.

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[22] Ibid., pages 40–44.

[23] Ibid., pages 41-42.

[24] Publications Office of the European Union, *European Union (EU) hierarchy of norms,* 2020, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM:norms_hierarchy>.

[25] Publications Office of the European Union, *Sources of European Union law,* 2020, available at >https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14534>.

[26] Paju, J, 'EU-domstolens roll – hur man kan anta en kritisk ansats', in Paju, J, Andersson, H, Bakardjieva Engelbrekt, A, Bernitz, U, Granmar, C & Lundquist, B. *Kritiskt Tänkande inom Europarätten,* Tallinn, Ragulka Press, 2018, page 68.

[27] Case 148/73, *Raymond Louwage and Marie-Therese Louwage, nee Moriame v Commission*, EU:C:1974:7, paras 7-12.

[28] Case C-308/04, *SGL Carbon v Commission*, EU:C:2007:277, para 48; Case C-407/04, *Dalmine v Commission*, EU:C:2007:53, para 134 and Case C-280/08, *Deutsche Telekom v Commission,* EU:C:2010:603, para 271.

[29] Hettne, J & Otken Eriksson, I, pages 120-122.

However, when the literal interpretation method is insufficient, the Court traditionally utilizes other interpretation methods to decipher the EU law (Article 19 of the TEU), namely historical-, contextual-, and teleological interpretation methods.[30] The thesis applies these methods in the essay's analysis of the GC judgment in the Illumina/Grail merger. Particularly the teleological interpretation will be essential in assessing the new approach's compatibility with fundamental principles of EU law.

It is important to note that the judgment given by the GC in the Illumina/Grail case, examined in this essay, will only hold legal significance in the long term if it remains unchanged by the CJEU, as the case is currently undergoing an appeal.[31]

Finally, the opinions of the Advocate General and the Commission's Guidelines are consulted in the paper since they are frequently applied by the EU courts and referred to in case law. However, due to their low position in the EU hierarchy of norms, they are employed with discretion and in conjunction with a legally binding source to enhance their legitimacy.

1.4.2 The Method of Law and Economics

The institutional objective of competition law is centered on the economic welfare standard. Therefore, the Law and Economics method is utilized to establish whether the current legal situation achieves the welfare objective. Please note, however, that this is not an economics paper. Nevertheless, due to the economic nature of competition law, it is inevitable to discuss the economic objectives of EU merger control.[32]

Two branches of economic theory are of interest - positive and normative economic analysis of law. Research question two is positive in nature as it aims to explain the law, while research questions one, three, and four are normative because they seek to establish how the law should best be designed to achieve economic efficiency.[33] Therefore, a positive economic analysis is applied to determine whether the current legal position is sufficient to achieve the economic objectives of EU merger control. In contrast, a normative analysis is utilized to critically analyze the economic efficiency of the law as it is and examine alternative options, that is, what should be. A specific economic theory, specified in Chapter Two, will be used as a benchmark for both the positive and normative analysis. In addition, the underlying economic objective of the Union, that is, the promotion of the internal market as established in the TEU, will also play a pivotal role in both the positive and normative analysis.

The essay topic will be approached through a legal lens and not founded on self-collected empirical data. Therefore, economic research findings are utilized

[30] Ibid., page 70.
[31] As mentioned earlier, the Illumina/Grail Judgement by the GC has been appealed to the CJEU.
[32] Bastidas Venegas, V, 'Rättsekonomi', in Nääv, M & Zamboni, M (eds.) *Juridisk Metodlära,* 2nd edn., Lund, Studentlitteratur AB, 2018, pages 183-184.
[33] Posner, R.A., *Some Uses and Abuses of Economics in Law*, [1979], vol. 46, no. 2, University of Chicago Law Review, p. 285.

in the essay to analyze the relationship between innovation and merger control regulation. In addition, the selected binding and non-binding secondary materials will be highly relevant sources from the Commission and courts, indicating how they interpret the law to pursue economic goals.

1.4.3 The Legal Analytical Method

In addition to applying the Law and Economics method to place the legal situation in a broader context, this thesis also utilizes the legal analytical method to answer research questions two, three, and four. The Legal Analytical Method is an accessible approach to critically analyzing a legal position.[34] While the EU Legal Method emanates from the notion that there is one correct answer to the question of 'what is right*,'* the Legal Analytical Method is based on the 'legal realistic' view that there is more than one legitimate solution to a legal question.[35] For this reason, the Legal Analytical method is an appropriate approach for a broad and open inquiry, drawing on a wide range of sources and providing an in-depth, multi-layered analysis using legal doctrine and soft law.

However, it is necessary to limit the sources used with clear-cut conditions due to the broad range of material authorized by the Legal Analytical Method.[36] Therefore, the legal doctrine has been selected with care. Consequently, the thesis draws conclusions from legal statements authored by officials within the EU apparatus and from legal doctrine written by experienced scholars and practitioners. The legal accounts by said individuals provide valuable practical perspectives that are examined to critically analyze conclusions based on legally binding sources within the EU legal framework.[37]

1.5 Delimitations

Many interesting questions could be explored within the context of the essay topic. It is, therefore, necessary to clarify numerous limitations.

In research question three, the thesis refers to the underlying objective of the EUMR. The EUMR has many underlying objectives, as it must be read in light of EU law. However, the analysis of Article 22 focuses exclusively on the relevant principles of primary law that come into play due to the new approach and the primary objective of the EUMR that pertains to the referral mechanism. The principles of primary law are limited to legal certainty, legitimate expectations, the principle of subsidiarity, and the principle of equality between Member States. In relation to EUMR-specific objectives, the thesis will only address the

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[34] Ibid.

[35] Sandgren, C., *Rättsvetenskap för uppsatsförfattare: Ämne, material, metod, argumentation och språk*, 5th edn., Norstedts Juridik, Stockholm, 2021, pages 53–54.

[36] Ibid.

[37] Ibid., pages 54–55.

underlying objectives which pertain to Article 22, such as the one-stop shop principle and merger synergies.[38]

The research questions concern EU law. Therefore, national law and national case law are not examined in the paper. However, national law and jurisprudence can be a source of inspiration to explore alternative mechanisms to ensure the reviewability of concentration without an EU dimension. In this regard, it is necessary to clarify that the essay does not apply the comparative method because the application of the comparative method would require an extensive description of different judicial systems, which might overshadow the essay's primary objective.

Subject to numerous exceptions, the EUMR applies to concentrations with an EU dimension. This essay does not discuss the criteria for applicability, nor does it conduct an in-depth examination of additional corrective mechanisms offered in the EUMR, as they do not affect the legal position of Article 22.

During the composition of this essay, a new tool for ex-post review of start-up acquisitions was introduced in the TowerCast judgment. This thesis will investigate the ex-post mechanism as an option to the Article 22 approach while refraining from extensively exploring the effects resulting from the CJEU's ruling in said case, even if it might, in part, fall within the scope of the last research question. This delimitation was made due to the many uncertainties introduced by the TowerCast judgment, which necessitates a more comprehensive analysis that cannot be accomplished within the limited confines of this thesis.

[38] Such as recitals 4-6 and 11-15 of the EUMR.

2 Are Nascent Acquisitions Inhibitors of Innovation?

2.1 Introduction

Article 3(3) of the TEU imposes a responsibility on the authorities within the Union and its Member States to encourage scientific progress. Furthermore, the EUMR acknowledges that transactions that support dynamic competition are beneficial in fulfilling this obligation.[39] Nevertheless, several theories regarding the most effective ways to sustain innovation in the market have emerged over time. The prevalent perspective is that transactions ought to be allowed, as a general rule, due to their ability to bring about dynamic efficiencies and economies of scope and scale.[40] Consequently, the Commission's authority to prohibit mergers is only supposed to be used in exceptional circumstances where they will prevent anti-competitive effects while simultaneously promoting dynamic competition in the market.[41] However, given the substantial changes in market structures over the years, it is necessary to question whether the existing threshold apparatus must be reformed to maintain dynamic competition.[42]

This chapter aims to examine economic theories concerning the effective management of dynamic markets through a competition lens, and to investigate reasons for market failures in this regard, especially the 'killer acquisition' phenomena introduced in the introduction of the essay. The theories explored in this chapter will form the basis for the law and economics analysis method employed in the thesis. Therefore, this chapter will also include examples in case law to demonstrate the significance that these theories hold in merger control.

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[39] See recital 4 of the EUMR.
[40] As will be illustrated in section 2.2.1-2.2.3
[41] EUMR, para 5.
[42] This will be explored in chapter 3.

2.2 Economic Theories on How to Stimulate Innovation

2.2.1 Creative Destruction versus the Replacement Effect

The theory of ‘creative destruction,’ developed by Joseph Schumpeter, constitutes a fundamental framework for examining the relationship between competition and innovation in competitive industries.[43] According to Schumpeter’s theory, monopolies are ultimately outperformed by competitors that are more successful in the race to produce landmark products and highly efficient internal processes.[44] Innovation-driven competition ensures that monopolies and oligopolies are conducive to innovation because they create an incentive for innovation-based competition for the market.[45] Therefore, to evade being outperformed by disruptive innovation introduced by rivals, monopolies direct their investments toward research and development (R&D) endeavors.[46] Schumpeter argued that the “perennial gale of creative destruction” does not impede the market but drives competition forward, ultimately benefiting consumers.[47] This implies that markets influenced by monopolies and oligopolies tend to be more beneficial for innovation and, therefore, consumer welfare than price-driven markets.[48]

In contrast to Schumpeter's theory, Kenneth Arrow proposed that firms operating in a monopolistic market lack the incentive to innovate compared to those operating in a competitive market. Arrow argued that incumbent companies have little incentive to invest in R&D to produce advanced products that could potentially supersede existing products. This is because new product profits could cannibalize profits from previous product lines, also referred to as the

[43] Evans, D., and Schmalensee. R., *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, [2002], vol. 2, Innovation Policy and Economy, page 2; OECD, page. 10, and Cunningham, C, Ederer, F, and Ma, S., pages 651 and 697.

[44] Schumpeter, J. A: *Capitalism, socialism and democracy,* Taylor & Francis e-Library, Routledge, 2003, pages 83-86.

[45] Ibid.

[46] Ibid.

[47] The significance of dynamic efficiency relative to price-efficiencies has also been discussed in case law. For example, in *GlaxoSmithKline,* concerning an Article 101 TFEU breach, where the CJEU ruled that increased prices could be outweighed by dynamic efficiencies stemming from profits that could be used for research within the pharmaceutical industry (Case C-501/06 P, *GlaxoSmithKline Services Unlimited v Commission,* EU:C:2009:610). See also, Schumpeter, J. A., page 105-106; Bailey, R., and Whish, R., *Competition Law*, 9th edn., Oxford University Press, Oxford, 2021, page 7.

[48] The significance of dynamic efficiency relative to price-efficiencies has also been discussed in case law. For example, in *GlaxoSmithKline,* concerning an Article 101 TFEU breach, where the CJEU ruled that increased prices could be outweighed by dynamic efficiencies stemming from profits that could be used for research within the pharmaceutical industry (Case C-501/06 P, *GlaxoSmithKline Services Unlimited v Commission,* EU:C:2009:610). See also, Schumpeter, J. A., page 105-106; Bailey, R., and Whish, R., *Competition Law*, 9th edn., Oxford University Press, Oxford, 2021, page 7.

'replacement effect.'[49] Consequently, incumbent firms are more concerned with preserving their dominant position than exploring new innovational opportunities.[50] In contrast, dominant companies that function in highly competitive markets, where price is the driving factor, are more inclined to engage in innovative R&D. This is because innovational research offers a greater chance to increase market shares, and the investments made in this type of innovation have the potential to produce significant returns in the long run.

However, Arrow neglected to consider that start-ups can pose a danger for monopolies as potential entrants. A study carried out by Gilbert and Newbury found that incumbents in specific markets are inclined to invest in innovation to build robust barriers to entry by generating intellectual property (IP) rights to avoid innovational interruption in the market.[51] The theory of 'disruptive competition' is exemplified in a study by Bower and Christensen, which showcases how emerging firms can introduce new products that customers do not initially value but eventually gain popularity and outcompete a product on the traditional market.[52] Bower and Christensen utilize Sony's transistor radios as an example; the radio compromised sound quality (a facet highly valued by customers at the time) to engineer portable radios that eventually caught up to the market consisting of traditional radios.[53] Therefore, one might argue that Arrow's replacement effect theory is incompatible with markets characterized by disruptive innovation and frequent implementation of IP rights.

2.2.2 Shapiro's principles of Contestability, Appropriability, and Synergies

In pursuit of a model that incorporates both Arrow's and Schumpeter's theories, Shapiro employed three principles to clarify what is central to sustaining innovation in any given market, the principles of (1) contestability, (2) appropriability, and (3) synergies (hereafter referred to as the 'three-principle model').[54]

The concept of contestability pertains to a company's ability to acquire and safeguard lucrative sales from its competitors, which is predominantly dependent on product substitutability.[55] According to Shapiro, increasing contestability within a given market leads to more significant innovation incentives. Essentially, a market can be considered contestable in two scenarios: (1) in a competitive

[49] Arrow, K.J., 'Economic Welfare and the Allocation of Resources for Invention', in *The Rate and Direction of Inventive Activity: Economic and Social Factors*, Princeton University Press, 1962, pages 621-622

[50] Ibid, page 609.

[51] Gilbert, R J. and Newbery, D M G., *Preemptive Patenting and the Persistence of Monopoly*, [1982], vol 72, no. 3, The American Economic Review, pages 514-526.

[52] Bower, J. L. and Christensen, C. M., *Disruptive Technologies: Catching the Wave*, [1995], January-February edn., Harvard Business Law Review, page 45.

[53] Ibid, page 44.

[54] Shapiro, C., "Competition and Innovation: Did Arrow hit the Bull's Eye?", *The Rate and Direction of Inventive Activity Revisited*, University of Chicago Press, 2012, page 365.

[55] Ibid, page 364.

market with low concentration or (2) in markets with few incumbent players and low barriers to entry, promoting new innovational entrants. The principle is consistent with Arrow's replacement effect model, where non-incumbent companies have more to gain from innovation due to low barriers to entry. At the same time, incumbents focus on maintaining the status quo by preserving their sales. Moreover, it is also coherent with Schumpeter's theory of creative destruction as dominant firms investing in disruptive innovation can access new market shares, while start-ups with limited resources may struggle to take advantage of a groundbreaking IP despite having the potential for expansion.

Shapiro contended that increased appropriability - a company's ability to reap social benefits derived from innovation – increases innovative pressure within the market.[56] The principle of appropriability relies heavily on a business's ability to protect its competitive advantage. This principle is consistent with Schumpeter's and Gilbert and Newbery's theory, which maintains that there will be no incentive to innovate if competitors can easily copy and commercialize innovation, thus undermining the innovating firm's R&D investments.[57]

The analysis in this thesis especially utilizes the concept of appropriability, often linked with the ability of investors and entrepreneurs to sell and exit, thereby obtaining a return on their investments. The capacity for such actions hinges partly on the assurance of legal certainty.[58]

In the context of market innovation, the concept of synergies pertains to a company's ability to foster innovation rather than simply being motivated to do so.[59] The underlying principle suggests that businesses cannot always effectively innovate in isolation without access to complementary resources and know-how that are critical in enhancing their innovative capabilities.[60] Therefore, combining technologies and expertise constitute a valuable strategy for enhancing a company's innovation ability on the free market.[61] In this regard, M&A is considered a crucial tool for effective innovation in the free market.

With remarkable simplicity, Shapiro has developed a model that incorporates Schumpeter and Arrow's two fundamental yet opposing theories concerning what market structures best spur innovation. The model successfully highlights the essential aspects of the relationship between innovation and competition and offers a simple structure that applies to numerous markets and cases. Notably, the three principles can be utilized as a valuable tool when evaluating merger-control regulations, which have been recognized by the Competition authorities.[62] Therefore, Shapiro's three-principle model will constitute a benchmark to evaluate the legal framework's efficiency in this thesis.

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[56] Ibid.

[57] Gilbert, R J. and Newbery, pages 514-526 and Schumpeter, J. A., pages 83-86.

[58] This will be discussed further in Section 2.2.3.

[59] Shapiro, C., pages 365 and 393.

[60] Ibid.

[61] Ibid. page 365.

[62] European Commission, Directorate-General for Competition, 'Competition policy brief', April 2016, page 2.

2.2.3 Shapiro's Three-principle Model in New Economy Market

Dynamically competitive industries, such as the digital-, telecommunications-, and pharmaceutical sectors, are commonly referred to as 'the new economy.' These industries are characterized by fierce competition between players striving to create groundbreaking and disruptive innovations to maintain market power.[63] In line with the Schumpeterian theory of creative destruction, incumbents in such industries feature an inherent incentive to invest in R&D to maintain their competitive advantage.[64] However, acquiring IP rights through M&A can constitute an alternative to investing in R&D to produce new IP. Interestingly, EU case law suggests that the Commission enforces merger control to foster innovation by ensuring competitive markets in line with Shapiro's model.[65] For example, this is illustrated in the Horizontal Merger Guidelines, which establish that horizontal mergers can enhance a business's ability and motivation to innovate, resulting in competitive pressure on its rivals to produce goods that can match or compete with new product standards.[66] This corresponds with Shapiro's theory of contestability, where incremental innovation leads to substitutable goods that are continually introduced to the market with minor improvements. Therefore, M&A constitutes an essential tool to spur innovation in new economy industries.[67]

In addition, it is a customary business strategy for entrepreneurs to engage in R&D to acquire IP rights and know-how, which they sell via M&A.[68] Therefore, the prospect of selling and exiting serves as a strong incentive for entrepreneurs to create a business that focuses on innovation to produce potentially lucrative assets.[69] In addition, the option to sell through M&A also constitutes a motivator for venture capitalists to invest in start-ups, increasing overall investment in innovation.[70] This aligns with Shapiro's principle of appropriability,[71] which suggests that the rate of innovation is higher in markets where there is an increased ability to reap the social benefits of innovation.[72]

Furthermore, incumbent firms enjoy substantial synergies by obtaining know-how and acquiring IP rights necessary for commercializing technologically advanced products or processes in vertical and horizontal mergers. Consequently, mergers between nascent and incumbent firms can produce substantial dynamic

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[63] Evans, D., and Schmalensee. R., pages 1-2. and Gilbert, R J. and Newbery, pages 514-526.
[64] Evans, D., and Schmalensee. R., pages 1-2.
[65] See European Commission, 'Competition policy brief', April 2016, page 2.
[66] European Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings', OJ 2004/C 31/03, para 38.
[67] Mosso, C. E., 'Innovation in EU Merger Control', Remarks prepared for the 66th ABA Section of Antitrust Law Spring Meeting, Washington, 12 April 2018, page 13.
[68] Jones, A, Sufrin, B & Dunne N, p. 1060.
[69] Philips, G. M., and Zhdanoc, A., *R&D and the incentives from Merger and Acquisition Activity*, [2013] vol. 25, no. 1, Review of Financial Studies, Society for Financial Studies, pages 34-78.
[70] European Commission, Directorate-General for Competition, Montjoye, Y., Schweitzer H., Crémer, J., *Competition policy for the digital era*, Publications office, 2019, page 111.
[71] Shapiro, C., page 364.
[72] Ibid., and Philips, G. M., and Zhdanoc, A., pages 34-78.

efficiency gains, increasing economies of scale and scope – and is inherently in line with Shapiro's model of how to best spur innovation.[73] The *Intel/McAfee* merger is an illustrative example in the sector of computer hardware mergers. Intel, a company that fabricates CPUs and chipsets, acquired McAfee, a software security firm. This merger allowed for the creation of integrated security solutions. The Commission ultimately cleared the merger with imposed commitments that guaranteed equal opportunities for competitors.[74] The Commission also recognized synergies in the *TomTom/TeleAtlas* case, where the combination of navigational systems and digital maps developers met the legal test for efficiencies.[75]

To conclude, Shapiro's principles of contestability, appropriability, and synergies undoubtedly play an essential role in merger control in the new economy markets. In a policy brief, the Commission established that if competition policy promotes contestability by keeping markets competitive and does not hinder appropriability significantly, it will support innovation in the market.[76] Since procedural and jurisdictional issues may have a severe impact on the levels of contestability, appropriability and, therefore, the ability to conduct synergetic merger, this thesis suggests that Shapiro's three-principle model should be considered not only during the substantiative test but also when producing the jurisdictional legal framework which enables the Commission's and national competition authority's (NCA) ability to review mergers.

2.3 Killer Acquisitions and Incentives for Incumbents to Eliminate Competition

Arrow's theory concerning disincentives for incumbents to innovate has attracted new attention recently. As alluded to in the introduction, recent studies have indicated that incumbents' aversion to innovation and their desire to maintain the status quo encourage incumbent companies to acquire nascent firms to prevent potential competitors or new inventions from entering the market by eliminating the start-up's operations.[77] Otherwise known as 'killer acquisitions'.[78] These acquisitions allow incumbent firms to maintain their revenue levels by preventing potential competitors from commercializing new disruptive products and processes or incurring costs to produce similar goods for their current

[73] Which is alluded to in the recital in para 4 of the EUMR. See also: Evans, D., and Schmalensee. R., page 2.

[74] Case M.5984, *Intel/McAfee*, Commission Decision of 26 of January 2011, paras 97-99, 109-112, 214 and 356.

[75] Case M.4854, *TomTom/TeleAtlas*, Commission Decision of 14 of May 2008, paras 192, 238-250.

[76] European Commission, 'Competition policy brief', April 2016, pages 2 and 7.

[77] Cunningham, C, Ederer, F, and Ma, S., *Killer Acquisitions*, [2021], Vol. 129, No. 3, Journal of Political Economy, page. 651.

[78] Ibid.

clientele.[79] A study published by Cunningham, Ederer, and Ma (hereafter 'Cunningham paper') shows that at least six percent of all acquisitions in the pharmaceutical sector are carried out to fulfill this purpose.[80] This amounts to around 50 such transactions annually within the pharmaceutical industry.[81] The theory of 'reverse killer acquisitions' is a closely related concept to the aforementioned theory of harm. It involves incumbents acquiring IP rights to suppress their own innovation to avoid redundancy in the market.[82]

The *Dow/Du Pont* case is a notable example of a killer acquisition, in which the Commission deemed the acquisitions harmful to innovation in the agrochemical market. This was due to internal documents which revealed that Dow intended to decrease investments in R&D after the merger. As a result, the transaction was cleared with significant remedies, including the divestiture of Dow's and DuPont's R&D organizations.[83]

The 'reduction of the innovation-competition' theory of harm also constitutes an example of M&A:s that harms innovation on the market. The *Medtronic/Covidien* case provides a good demonstration of this theory. Medtronic, a company that dominates in the production of medical devices used to treat vascular disease, acquired Covidien, a company that developed a new type of treatment (Stellarex) for a type of vascular disease.[84] The Commission cleared the acquisition on the condition that Medtronic divests the Stellarex business to maintain innovative pressure on the market for treatments of vascular diseases.[85] Many other cases have been based on similar concerns regarding maintaining innovative pressure in technologically advanced markets.[86]

Vertical and conglomerate mergers can also result in the elimination of competition and decreased innovation. A common factor the Commission often considers in non-horizontal mergers is the incumbents' ability to foreclose actual or potential competitors on vertical markets.[87] This was the leading theory of harm in the *Intel/McAfee* case discussed above. The Commission's worry, healed

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[79] Ibid, page. 655 and OECD, *Start-ups, Killer Acquisitions and Merger Control*, page. 10.

[80] Cunningham, C, Ederer, F, and Ma, S., page. 697.

[81] Cunningham, C, Ederer, F, and Ma, S., page. 697. and Cabral, L., *Merger policy in digital industries*, [2021], vol. 54, Information Economic and Policy, available at <http://luiscabral.net/economics/publications/IEP%202021.pdf>, page 5.

[82] Caffarra, C, Crawford, G. and Valletti, T., *How tech rolls': Potential Competition and 'Reverse' Killer Acquisitions*, OECD, 11 May 2020, available at <https://oecdonthelevel.com/2020/11/27/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions/>, accessed on 4 February 2023

[83] Case M.7932, *Dow/DuPont*, Commission Decision of 12 October 2017.

[84] Case M. 7326, *Medtronic/Covidien*, Commission Decision of 28 November 2014, paras 2-3.

[85] Ibid, para 416.

[86] Se For example: Case M.3916, *T-Mobile/TeleRing*, Commission Decision of 26 April 2006; Case M.6992, *Hutchinson 3G UK/ Telefónica Ireland*, Commission Decision of 28 May 2014; Case M.7275, *Novartis/ GlaxoSmithKline*'s *oncology business*, Commission Decision of 28 January 2015 in combination with Case M. 7276, *GlaxoSmothKline/ Novartis Vaccines Business,* Commission Decision of 28 January 2015 and Case M. 7278, *General Electric /Alstom (Thermal Power-renewable Power & Grid Business)*, Commission Decision of 8 September 2015.

[87] European Commission, 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings', OJ 2008/C 265/07, para 33.

through remedies, was that Intel could foreclose McAfee's competitors within the security software industry on the vertical market, potentially leading to weakened competition on the security software market, which would have decreased contestability.[88]

In addition to the paper by Cunningham on pharmaceutical markets, studies have also been conducted in the digital sphere. Igami and Uetake discovered that players in the Hard Drive Disk industry merge to eliminate competition and acquire know-how.[89] Additionally, Gautier and Malesich analyzed 175 mergers by Google, Amazon, Facebook, Apple, and Microsoft from 2015 to 2017 and concluded that the acquired product was discontinued in 60% of the mergers.[90] Interestingly, only a few of the mergers analyzed in the study by Gautier and Malesich were reviewed by a competition authority, and none were blocked.

However, simply discontinuing an acquired product does not inherently imply that a merger has hindered innovation in the market. It is possible that nascent companies are being acquired to obtain synergies that can be assimilated into the acquiring company's business or that the products of the target company do not meet the acquiring company's expectations, rendering them to shut that part of the business down.[91] Interestingly, economic studies have found that killer acquisitions are less frequent in the digital market than in the pharmaceutical market.[92] Instead, the research found that most mergers in the digital market aim to enhance incumbents' innovative capabilities by gaining followers and data to penetrate new markets.[93] This, in turn, eliminates competition and adds another layer of complexity to the evaluation of the said mergers. The following figure further supports this concept.

[88] Commissions Decisions Intel/McAfee. See also: Case M.6564, *ARM/Giesecke & Devrient/Gemalto JV*, Commission Decision of 6 November 2012 and Case M.6314, *Telefónica UK/Vodafone UK/everything Everywhere JV*, Commission decision 4 September 2012.

[89] Igami, M. and Uetake, K., *Mergers, Innovation, and Entry-Exit Dynamics*: *Consolidation of the Hard Disk Drive Industry 1996-2015*. [2020], vol. 84, no. 6, Review of Economic Studies, Oxford University Press, pages 2672-2702.

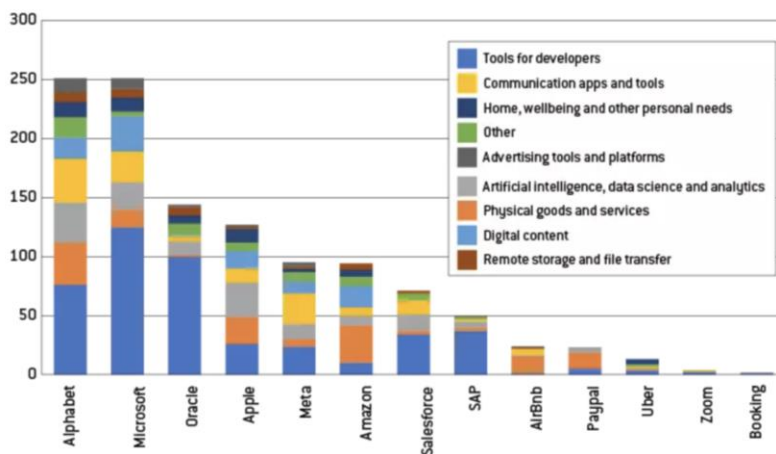
[90] Gautier, A., Lamesch, J., *Mergers in the digital economy*, [2021] Vol. 54, Information Economics and Policy, available at < https://www.sciencedirect.com/science/article/abs/pii/S0167624519302537> accessed on 4th of February 2023.

[91] Ibid, pages 2-3.

[92] Latham, O., Tecu, I. and Bagaria, N., *Beyond Killer Acquisitions: Are There More Common Potential Competition Issues in Tech Deals and How can These Be Assessed?,* CPI Antitrust Chronicle, May 2020, available at <https://media.crai.com/wp-content/uploads/2020/09/16164722/CPI-Latham-Tecu-Bagaria.pdf> accessed on 3rd of February 2023.

[93] Ibid., page 11.

Figure 1: Acquisitions per cluster by likely gatekeepers, 1987 to July 2022[94]



From Figure 1, it can be deduced that digital incumbents merge with different types of businesses. Thus, it can be inferred that numerous vertical and conglomerate mergers aim to achieve synergies and broaden the digital ecosystem with supplementary services rather than eliminating potential competition—for instance, Apple's acquisition of Shazam.[95] Vertical and conglomerate mergers are typically subjected to less scrutiny than horizontal mergers because they usually lead to significant synergies and do not cause fewer competitors within any given market.[96] The *Facebook/WhatsApp case* serves as a prominent example of how acquiring data through mergers can benefit the acquirer's product offerings and act as a barrier to entry, especially in two-sided markets that are greatly amplified by network effects.[97] As such, careful consideration and analysis should be conducted by the competition authorities in the digital sector to ensure fair

[94] Figure 1: Carugati, C., *Which mergers should the European Commission review under the Digital Markets Act?,* Bruegel, Policy brief, 18 August 2022, Date Accessed: February 3 2023, available at <https://www.bruegel.org/policy-brief/which-mergers-should-european-commission-review-under-digital-markets-act>.

[95] Case M.8788, *Apple/Shazam*, Commission Decision of 6 September 2018.

[96] Jones, A, Sufrin, B & Dunne N, page 1064

[97] The Commission narrowly defined the messaging services market, which is why WhatsApp was not considered a direct competitor to Facebook in the investigation. Ultimately, the merger was cleared due to the broad nature of Facebook's social networking service but was re-scrutinized years later due to Facebook having given misleading information regarding their ability to incorporate WhatsApp within their own platform. See Case M.7217, *Facebook/ WhatsApp*, Commission Decision of 3 October 2014; European Commission, *Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover*, Press release of 18 May 2017, available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369>, accessed on 1st of March 2023.

competition and a level playing field in the market, as high barriers to entry lead to a lower level of contestability.[98]

2.4 Chapter Conclusion

The aim of this chapter was to familiarize the reader with Shapiro's three-principles model that outlines how to sustain market innovation and to introduce the concept that innovative pressure in the new economy sometimes compels incumbents to stifle further attempts at innovation, resulting in the elimination of (innovative) competition.

In response to the first research question, evidence shows that dominant firms participate in nascent acquisitions to dampen innovational advances in horizontal and related vertical markets within some of the new economy sectors. The studies discussed indicate that pure killer acquisitions are more commonly seen in the pharmaceutical industry than in the digital industry. However, there are other theories of harm that are more significant in the context of mergers between incumbent and nascent firms in the digital sphere, such as the loss of a potential competitor or foreclosure of competition on a down or upstream market. Accordingly, it is crucial for the Commission to be cautious regarding acquisitions between dominant and nascent companies that hinder innovation by obstructing potential competitors or innovative projects. While the Commission requires a competition tool that can identify these types of acquisitions, it is also critical to acknowledge that far from all nascent acquisitions are harmful to competition, as they can produce synergies and promote investments in new startups.

These disincentives to innovate and use the M&A tool to erode dynamic competition in the new economy industries have raised concerns for the Commission in recent years. As seen in merger control legislation, guidelines, and case law, the Commission considers innovational harm a severe threat to competition during its substantive assessment. Interestingly, and most relevant to the purpose of this thesis, studies by Cunningham and others, Gautier and Malesich, and Igami and Uetake indicate that the Commission rarely reviews nascent acquisitions mergers that may result in potential harm to innovation in a market. This is especially problematic given that start-ups are a vital source of innovation, particularly in the new economy sectors characterized by disruptive competition. The following chapter will delve deeper into this aspect.

[98] Jones, A, Sufrin, B & Dunne N, page 1066 and Montjoye, Y., Schweitzer H., Crémer, J., *Competition policy for the digital era* and Capobianco, A. and Nyeso, A., *Challenges for Competition Law Enforcement and Policy in the Digital Economy*, [2018], vol.9 no. 1, Journal of European Competition Law & Practice, pages 19-27.

3 Does the EU Legal Framework Permit Review of Nascent Acquisitions?

3.1 Introduction

It is crucial to have a comprehensive understanding of the current legal position when contemplating the need for legislative changes. Thus, the primary purpose of this chapter is to provide an overview and critical analysis of the jurisdictional thresholds and corresponding corrective mechanisms in the EUMR. This includes an overview of the history of Article 22 and an in-depth examination of the new approach as presented in the Article 22 Guidelines. Furthermore, the analysis will be concluded by evaluating the EUMR's effectiveness in maintaining dynamic competition using the principles of contestability, appropriability, and synergies discussed in Chapter 2.

3.2 The Failure to Consider Nascent Firms as Innovational Vectors

3.2.1 Overview of Turnover-based Thresholds in Article 1 of the EUMR

Per the principle of attributed powers,[99] a reviewable transaction must conform to the scope of the EU treaties and regulations. As stated in Article 21(1) of the EUMR, the EUMR exclusively applies to concentrations of undertakings with an EU dimension, as defined by the turnover-based thresholds outlined in Article 1 of the EUMR.[100] The development of the threshold system and its corresponding corrective mechanisms resulted from a compromise among Member States. The main objective was to define and clarify the jurisdiction between the Commission and NCA.[101] An additional factor in the regulatory system of the EUMR is geographic turnover-based thresholds, which ensure that the most competent authority conducts merger investigations.[102] The division of authority aligns with

[99] Codified in article 5(2) of the TEU.

[100] EUMR, Recitals 4-6 and 38.

[101] Broberg, M., *Improving the EU Merger Regulation's Delimitation of Jurisdiction: Redefining the Notion of Union Dimension*, [2014], vol. 5, no. 5, Journal of European Competition Law & Practice, page 262.

[102]European Commission, 'Commission Consolidated Jurisdictional Notice Under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings', OJ 2008/C

the principle of subsidiarity stated in Article 5 (3) of the TEU, which entitles governments to act locally rather than being mandated from above by a central authority.[103]

Article 1 of the EUMR provides two successive tests, also known as the 'bright-line' test, designed to determine whether a concentration has an EU dimension. The primary test in Article (1)2 establishes that a concentration has an EU dimension when at least two of the undertakings concerned have a combined aggregate worldwide turnover of at least €5000 million and an aggregate Community-wide turnover exceeding €250 million.[104] The secondary test in Article 1(3) of the EUMR provides that a concentration that does not meet the requirements in Article 1(2) have an EU dimension if the combined aggregate worldwide turnover of the undertakings concerned exceeds €2,500 million; and the aggregate turnover of each of the undertakings concerned in the concentration exceeds €100 million in at least three Member States; and the aggregate turnover of at least two of the undertakings concerned in the concentration exceeds €25 million in at least three Member States; and the aggregate Community-wide turnover of at least two of the undertakings concerned in the concentration exceeds €100 million.

If a concentration's turnover surpasses the thresholds, it is important to consider the conditions prescribed in the *proviso* found in both Article 1(2) and 1(3) of the EUMR, which dictates that the Commission will refrain from reviewing a concentration where all involved undertakings attain at least two-thirds of their total Community-wide turnover within one EU Member State (the two-thirds rule).[105]

3.2.2 Failure to Incorporate Concentrations Involving Nascent Firms

Thresholds based on turnover are utilized to estimate the economic resources involved in a transaction; high resource allocation may significantly impede competition in the EU markets. Another rationale behind the utilization of quantitative thresholds is to provide a simple method for companies to determine whether a transaction is notifiable under the EUMR.[106] The obligation to notify poses a substantial economic risk for the undertakings concerned which must be considered during negotiations before a purchase agreement is signed and closed.

95/01, para 124 and European Commission, 'Evaluation of procedural and jurisdictional aspects of EU merger control', (Evaluation), SWD(2021)66, para 50, and recital 5 of the EUMR.

[103] See recital 8 of the EUMR.

[104] Both requirements must be fulfilled for a concentration to have an EU-dimension.

[105] This constitutes a geographic turnover-based threshold to ensure that the concentration is reviewed by the most appropriate authority.

[106] Case T-417/05, *Endessa v Commission*, 2006, EU:T:2006:219, para 180; Recitals 9 and 10 of the EUMR and European Commission, OJ 2008/C 95/01, para 35.

Therefore, predictability in merger control regulation is necessary for the free market to function properly.[107]

Nevertheless, the current thresholds fail to consider concentrations involving undertakings with low aggregate turnover, such as start-ups, which can lead to a lack of consideration for innovation in the new economy markets.[108] While incumbent firms often meet the requirements of the bright-line test, nascent firms typically do not, rendering nascent acquisitions unreviewable.[109] As discussed in Chapter 2, nascent acquisitions may result in a reduction in competition and an increase in barriers to entry that could potentially have detrimental effects on the overall contestability of the market. Thus, consideration of this aspect is essential to ensure dynamic competition and the commercialization of innovative consumer and society-oriented products. While the quantitative test is advantageous as a measure of market power and provides legal certainty for businesses, the use of rigid boundaries results in a hit-and-miss situation in regard to harmful nascent acquisitions. Therefore, at the center of the issue lies a trade-off between permitting transactions that may harm innovation (type I errors) and prohibiting transactions that could promote innovation (type II errors).[110]

3.3 Three Corrective Mechanisms

Lawmakers acknowledged numerous potential risks inherent in utilizing quantitative thresholds, such as conflicts with the principle of subsidiarity.[111] To address these concerns, they incorporated three corrective mechanisms in the EUMR.[112] All three mechanisms are founded upon the principle that the most appropriate authority should be allowed to conduct merger investigations.[113]

The first corrective measure is the *two-thirds rule* (described in section 3.3.1), intended to prohibit the Commission from scrutinizing cases with a profound connection to one Member State.[114] Additionally, the second corrective mechanism, which involves pre-notification referrals in Article 4(4) and Article 4(5) of the EUMR, allows concerned parties to initiate referrals either from the Commission to Member States [Article 4(4)] or from Member States to the Commission [Article 4(5)], provided that certain conditions are met.[115] Article 4(5) is

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[107] Modrall, J.R., 'Competition Law Issues in the M&A Deal Process', in Levy, N. and Cook, C., *European Merger Control Law: A Guide to the Merger Regulation*, vol. 2, Matthew Bender and Company Inc, 2002, chapter 25, pages 12, 15, 22 and 26-36.
[108] Broberg, M., pages 263-264.
[109] OECD, *Start-ups, Killer Acquisitions and Merger Control* page. 17
[110] Cabral, L., page 5.
[111] European Commission, 'Community Merger Control Green Paper on the Review of the Merger Regulation', (Green Paper), COM(96) 19, paras 10, 91 and recital 11 of the EUMR.
[112] Ibid.
[113] European Commission, 'Communication from the Commission to the Council: Report on the functioning of Regulation No 139/2004', (Communication), COM(2009)281, para 5.
European Commission, 'Jurisdictional Notice', OJ 2008/C 95/01, paras 125-126 and European Commission, SWD(2021)66, para 50.
[115] For example, Article 4(5) was utilized in the Facebook/WhatsApp merger.

especially beneficial when the concentration must be notified in several member states, thereby enforcing the 'one-stop-shop' principle.[116] The one-stop-shop principle aims to minimize the burden for businesses by enabling them to notify the Commission rather than undergoing multiple parallel merger processes in each Member State where they are notifiable.[117] Lastly, there are two reverse referral mechanisms post-notification, namely Articles 9 and 22 of the EUMR. The former allows Member States to request a post-notification referral from the Commission, while the latter permits a referral from the Member States to the Commission.[118]

The Commission has imposed a new Article 22 approach which widens its authority to address concerns regarding the threat to innovation posed by nascent acquisitions.[119] This maneuver permits the Commission to scrutinize transactions between incumbents and nascent firms under certain conditions. The forthcoming sections will explore Article 22 in more detail.

3.4 The Dutch Clause, from Corrective Mechanism to Competition Spear

3.4.1 An Overview of Article 22

Article 22 prescribes that upon request by one or multiple Member States, the Commission can scrutinize any concentrations that satisfy the definition of Article 3 of the EUMR but do not have an EU dimension as per Article 1 of the EUMR. These concentrations must also impact trade between Member States and have the potential to significantly affect competition within the Member State or States that submit the referral.[120]

The application of post-notification referrals can lead to substantial economic costs for the undertakings involved.[121] Therefore, policymakers and the Commission have determined that Article 22 referrals should be limited to cases where a preliminary review uncovers an exceptional risk of significant anticompetitive effects on trade between Member States to mitigate the risks involved for parties subject to scrutiny.[122] In this respect, the Commission has, until recently, discouraged referrals of concentrations that fall outside the scope of existing national

[116] European Commission, OJ 2008/C 95/01, paras 70-77.
[117] European Commission, OJ 2008/C 56/01, paras 11-12.
[118] European Commission, COM(2009)281, para 10.
[119] Vestager, M., *The future of EU merger control*, Speech of 11 September 2020.
[120] Article 22(1) EUMR.
[121] As explained in Section 3.2.2. See Modrall, J.R., Chapter 25, pages 12, 15, 22 and 26-36.
[122] European Commission, 'Green Paper: On the Review of Council Regulation', (Green Paper) COM(2001)745, para 96 and European Commission, *Commission Notice on Case Referral in respect of concentrations*, OJ 2008/C 56/01., paras 13, 14 and 45. Especially para 13 which reiterates that a: "referral should normally be made when there is a compelling reason for departing from 'original jurisdiction'… particularly at the post-notification stage".

merger thresholds; said concentrations do not have an EU nexus, which indicates that the resources transferred are so insignificant that the transaction is unlikely to have a substantial impact on trade and competition within the EU markets.[123]

Concentrations must be referred within 15 working days of their notification or within 15 working days of the date the merger was *made known* to the Member States where no notification is required.[124] Upon such a request, any Member State can join the referral within the time limit. However, the Member States that refer or join a referral can no longer scrutinize the concentration on a national level.[125] This is in line with the one-stop-shop principle, which is fundamental within EU merger control as it allows for a coordinated approach to handling mergers across Member states, reducing the potential for conflicting decisions from different authorities across the EU and reducing the obligation for multiple filings.[126]

Moreover, the final provision in Article 22(5) permits the Commission to invite Member States to refer to specific concentrations that satisfy the criteria specified in Article 22(1) of the merger regulation.[127]

3.4.2 History of the Dutch Clause

Article 22 of the EUMR, commonly referred to as the 'Dutch Clause,' was included in the first draft of the EUMR (4064/84) at the request of the Netherlands as a safeguard for Member States without national merger control regulations.[128] As such, Article 22's provisions do not entail any restrictions on the acceptance of concertation referrals solely by Member States that possess the competence to review such transactions.[129] The first three referrals were made by Member States without national merger regulations in place.[130] Nevertheless, as time progressed, the majority of Member States adopted their own regulations to govern concentrations, making Article 22 obsolete.[131] As a result, the Commission revised its

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[123] European Commission, OJ 2021/C 113/01, para 14 and European Commission, *Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control*, Brussels, Press release 26 of March 2021.

[124] Article 22(1) subparagraph 2.

[125] Article 22(2).

[126] European Commission, 'Commission Notice: Guidelines on the effect on trade concept contained in Articles 81and 82 of the treaty', OJ, 2004/C 101/07, para 11.

[127] Article 22(5).

[128] The Dutch government requested the referral mechanism because they did not have their own merger control, hence the nickname.

[129]Article 4.5 of the EUMR, however, does include such a provision: "…a concentration… which does not have a community dimension within the meaning of Article 1 which is capable of being reviewed under the national competition laws of at least three members states."

[130] Case M.553, *RTL/Veronica/Endemol*, Commission Decision of 20 September 1995 (and aff'd Case T-221/95, *Endemol Entertainment Holding BC v Commission*, 1999, ECLI:EU:T:1999:85),; Case M. 784, *Kesko/Tuko*, Commission Decision of 20 November 1996 and aff'd Case T-22/97, *Kesko Oy v Commission*, 1999, ECLI:EU:T:1999:327); Case M. 890, *Blokker/Toys 'R' Us*, Commission Decision of 26 of June 1997.

[131] Today, only Luxemburg lacks a national merger regulation.

procedure in the 'Green Paper 2001' to encompass mergers better suited for review by the Commission due to significant cross-border effects.[132] The emerging legislation established a collaborative referral mechanism whereby one or more Member States could jointly refer a concentration, thereby allowing the Commission to "step into (the NCAs) shoes."[133] The first joint referral decision was issued in 2002 in the *Promatech SpA/Sulzer AG,*[134] and has been utilized somewhat sparingly since then.[135]

While Article 22 does not explicitly prohibit referrals of concentrations that do not fall within the scope of established national regulations, such referrals have previously been discouraged.[136] Nevertheless, the Commission has acknowledged a number of collaborative referrals, consisting of at least one Member State, where the extent of their domestic merger regulation did not give the NCA the power to examine the concentration.[137] For instance, in the *Johnson & Johnson/Tachosil* - case, where Germany referred the concentration to the Commission for review.[138] The French Competition Authority decided to join the referral request even though the transaction was not required to be notified in France. The Commission deemed the French authority's request admissible based on the criteria in Article 22 of the EUMR.[139] Therefore, in cases where referrals are made jointly, the Commission typically does not distinguish between Member States, regardless of whether the concentration falls outside the legal jurisdiction of the Member States from which the referral originated.[140]

Furthermore, the Commission added Article 22(5), which enables the Commission to inform NCA:s about concentrations that satisfy Article 22(1)'s conditions.

In 2014, the Commission conducted a review of the referral approach and came to the conclusion that Article 22 needed to be revised.[141] Specifically, they suggested that the regulation should stipulate that only one or more Member States with nationally afforded competence to review a transaction should be able

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[132]European Commission, (Green Paper) COM(2001)745, paras 84-86.
[133] Ibid.
[134] Case M.2698, *Promatech SpA/Sulzer AG*, Commission Decision of 24 July 2002
[135] Article 22 has been used 41 times since 1993 with only four refusals from the Commission , see European Commission, 'Statistics on Merger Cases', Published 5 March 2021, available at <https://competition-policy.ec.europa.eu/mergers/statistics_en>, Accessed on 29th of January 2023.
[136] European Commission, *Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control*, Brussels, Press release 26 of March 2021 and European Commission, OJ 2021/C 113/01, para 14.
[137] See Case M.5828, *Procter & Gamble/Sara Lee Air Care*, Commission Decision of 31 March 2010; Commission's decision *Apple/Shazam*; Case M.8832, *Knauf/Armstrong,* Commission Decision of 15 mars 2018, Case M.9547, *Johnson & Johnson/Tachosil*, Commission Decision of 22 September 2019.
[138] Commission's decision *Johnson & Johnson/Tachosil*, para 4.
[139] Ibid, para 36.
[140] European Commission, COM(2009)281, para 145.
[141] European Commission, 'Towards more effective EU merger control', (White Paper) COM(2014)449, and European Commission, 'Executive Summary of the Impacts Assessment; Accompanying the document 'White Paper: Toward more effective EU merger control', (Summary of impact assessment), SWD(2014)218.

to request a referral.[142] The Commission concluded that this change would provide greater legal certainty and promote adherence to the principle of subsidiarity.[143] However, despite the recommendations outlined in the review, no modifications have been implemented to the existing system.[144]

In a speech at the European Competition Day 2020, Commissioner Vestager announced that the Commission "…plan to start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level- whether or not those authorities had the power to review the case themselves."[145] The following year the Commission published new Article 22 Guidelines (Guidelines) which outline the Commission's new approach to Article 22, which will be reviewed in the following section.

3.4.3 An Overview of the New Article 22 Approach

3.4.3.1 The First Criterion: EU-nexus

As previously introduced, two main criteria determine if a concentration is suitable for referral under Article 22. The first requirement necessitates that the concentration impacts the trade among Member States, which ensures that only concentrations with an EU nexus are examined by the Commission. The concept of the 'trade' requirement refers to any cross-border activities that affect the market's competitive structure, either presently or potentially.[146] This broad definition is consistent with previous case law and the Notice on Effect on Trade between Member States.[147] Therefore there is little novelty value in the 'effect on trade' concept portrayed in the new Guidelines.[148]

The examination of the impact on trade between Member States requires careful consideration of various factors that may not be conclusive when evaluated in isolation.[149] As per the Notice on referrals, a concentration that has "some discernible influence on the pattern of trade between Member States" is the subject of review by the Commission.[150] The new Guidelines have highlighted some essential factors to consider when assessing mergers that could potentially harm competition in the Community market. These factors include the location of

[142] White Paper, COM(2014)449, paras 69-70 and footnote 45.

[143] European Commission, SWD(2014)218, table in section 3.4.2 and para 30.

[144] GC's Judgement *Illumina Inc. v European Commission*, para. 31.

[145] Vestager, M., *The future of EU merger control*, Speech of 11 September 2020

[146] European Commission, OJ 2021/C 113/01, para 14.

[147] Case 56/65, *Société Technique Minière Ulm*, EU:C:1966:38, page 249; Case 322/81, *Michelin v Commission*, EU:C:1983:313, para 104; Case C-41/90, *Höfner and Elser v Macrotron Gmbh*, EU:C:1991:161, paras 32-33 and European Commission, 'Commission Notice: Guidelines on the effect on trade concept contained in Articles 81and 82 of the treaty', OJ, 2004/C 101/07, paras 19-24.

[148] See Joined Cases 56/64 and 58/64, *Consten and Grundig*, EU:C:1966:41 page. 341 and Case 107/82, *AEG v Commission*, EU:C:1983:293, para 6.

[149] For instance, See Case 42/84, *Remia v Commission*, EU:C:1985:327, para 22 and Case C-359/01, *British Sugar Plc v. Commission,* EU:C:2004:255 para. 27.

[150] European Commission, OJ 2008/C 56/01, para. 43.

customers, the type of product and services, data collection across the union, and R&D projects that may result in IP rights with potential commercialization in the EU.[151]

This, in combination with Commissioner Vestager's statements concerning how a company's competitive importance cannot be measured through turnover,[152] indicates that the Commission is explicitly targeting concentration which can harm innovation on the market.

3.4.3.2 The second criterion – significant anticompetitive effect

Before referring a concentration to the Commission, Member States need to prove that a concentration poses a significant threat to competition within their jurisdiction. This ensures that a concentration of concern warrants additional scrutiny regardless of the turnover of the undertakings concerned.[153] Accordingly, Article 22 is exclusively designated to be utilized on concentrations with significant anticompetitive effects within the union market, owing to the prospective economic risk for the undertakings concerned.[154]

The new Guidelines highlight additional factors to consider when assessing the second requirement. These considerations include the predominant position held by the concerned undertakings, possible elimination of innovative forces, a potential decline in the ability and incentive to compete on horizontal and vertical markets, and any motivation for incumbents to abuse or exclude others by leveraging their dominance.[155] Additionally, concentrations involving undertakings whose turnover does not accurately reflect future competitive potential may merit additional scrutiny.[156] This is especially true for concentrations where a nascent undertaking has not yet monetized its IP that has the potential to generate significant profits or is currently involved in lucrative R&D endeavors.[157] Such scrutiny may also be necessary when emerging firms serve as a critical competitive force in the market or possess access to essential facilities or inputs for both horizontal and vertical markets.[158]

At first glance, the second criterion seems to narrow down the potential transactions which may be subject to review under Article 22. However, the referral review aims to determine whether a *prima facie*-review of a concentration reveals said competition concerns which necessitate extra scrutiny.[159] The review required for referrals should not be mistaken with the Substantial Lessening of Competition test, which is a more comprehensive assessment conducted once a competition authority has taken up a concentration for review. However, the Guidelines do not provide an explanation of what constitutes a *prima facie* review.

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151 European Commission, OJ 2021/C 113/01, para. 14.
152 Vestager, M., *The future of EU merger control*, Speech of 11 September 2020.
153 European Commission, OJ 2008/C 56/01, paras. 9 and 43-45.
154 Ibid, paras 13, 14 and 45. See also European Commission, COM(2001)745, para 96.
155 European Commission, OJ 2021/C 113/01, para. 15.
156 Ibid., para. 19.
157 Ibid.
158 Ibid.
159 European Commission, OJ 2008/C 56/01, paras 13, 14, 44 and 45. See also European Commission COM(2001)745, para 96.

This, in combination with the unspecific Guidelines, provides the Commission with a vast discretion to accept a broad range of merger referrals.

3.4.3.3 Procedural Aspects of the New Guidelines

Article 22(1) states that a Member State must submit a referral request within 15 working days from the day the transaction was *made known* to the Member State. The Notice on merger referrals clarifies that the phrase *made known* denotes the point at which the Member States concerned received adequate information to assess the merger formally.[160] Once received, the Commission, in turn, is obligated to respond to such a referral promptly.[161]

The new Guidelines establish that it is generally not within the Commission's purview to consider referrals that extend beyond six months from the underlying transaction's completion unless the transaction is believed to carry an unprecedented adverse impact on consumer welfare.[162] However, the Guidelines do not explicitly define what constitutes an exceptional case. Moreover, the Guidelines provide that the Commission will consider if the concentration has been notified and taken up for review in other Member States.[163]

Especially noteworthy is that the Guidelines announce that the Commission will now accept referrals for concentration that cannot be scrutinized under national merger laws of the referring Member States.[164] In addition, the Guidelines stress the Commission's strong commitment to close cooperation with Member States in identifying such transactions that satisfy the prerequisites of Article 22. Where said concentrations are identified, the Commission must inform Member States where the concentration could have an anticompetitive impact, allowing them to refer the concentration to the Commission.[165]

To address any uncertainty regarding whether a given concentration falls under Article 22's scope, entities are free to seek early indication from the Commission proactively. The Commission also accepts tips from third parties who believe a particular concentration may pose an issue that fits the referral scope.[166]

3.5 Chapter Conclusion: Is the New Approach Warranted?

The reviewability mechanism in the EUMR (prior to the new Guidelines) lacks consideration of innovative theories of harm. The thresholds were primarily designed to capture mergers between parties with significant economic resources, whereas the corrective mechanisms were originally implemented to uphold the

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[160] European Commission*,* OJ 2008/C 56/01, footnote 43.
[161] European Commission, OJ 2021/C 113/01, para. 28.
[162] Ibid., para. 21.
[163] This to comply with the one-stop shop principle - Ibid, para. 22.
[164] European Commission, OJ 2021/C 113/01, para. 23 in combination with Article 22(4) of the EUMR.
[165] Ibid., para. 26.
[166] European Commission, OJ 2021/C 113/01, para. 25.

one-stop-shop principle and adhere to the principle of the most appropriate authority.

To answer research question two, the legal framework for evaluating the reviewability of nascent acquisitions prior to the release of the new guidelines has proven insufficient in preventing highly concentrated markets with high barriers to entry in the new economy sectors.[167] As a result, Shapiro's contestability theory would suggest that the incentive to compete and innovate in new economy markets was reduced.[168] This proves that there was a need for re-evaluating the merger review process. Thereby, it can be concluded that the current legal framework is sufficient for enabling the appropriate authorities the jurisdiction to review anti-competitive nascent acquisitions if the Commission's new Article 22 approach aligns with the EUMR's fundamental principles and legal framework. Therefore, the answer to research question two hinges partly on the answer to research question three.[169]

Regardless, it is imperative that the Commission is given a competition tool to ensure proper scrutiny of anti-competitive nascent acquisitions. Nevertheless, it is also apparent that the Commission must proceed with caution to prevent overenforcement. Granting the Commission increased flexibility to review mergers below the turnover thresholds could result in an increase in merger control aggression and the prevention of potentially beneficial merger synergies that could promote further innovation. For example, certain mergers, especially those in the digital market, may produce substantial synergies that promote innovation and consumer welfare.[170] Quantifiable thresholds and clearly defined procedural regulations governing the corrective measures have provided significant legal certainty.[171] As a result, undertakings have been able to foresee their obligation to notify accurately, whereby investors and entrepreneurs have been able to rely on the free market's sell- and exit strategy, leading to increased appropriability.[172] Conversely, excessive and unclear practices may deter investors and entrepreneurs from pouring resources towards new innovations, as the sell and exit strategy becomes involves an increased risk, causing a reduction of innovation on the free market. Therefore, the motivation for entrepreneurs and venture capitalists to invest in innovation might have compensated for the disadvantage of reduced contestability in the new economy markets to some extent.[173]

In contrast, the introduced Article 22 Guidelines present numerous ambiguous parameters that empower the Commission with a highly versatile competition tool.[174] This tool can be employed against almost any concentration that

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[167] See European Commission, 'Industry concentration and competition policy', Competition Policy brief Issue, 2021/02

[168] Shapiro, page 364.

[169] Research question three: "How compatible is the Commission's and GC's new interpretation of Article 22 with the underlying objectives of the EUMR".

[170] Latham, O., Tecu, I. and Bagaria, N., *Beyond Killer Acquisitions: Are There More Common Potential Competition Issues in Tech Deals and How can These Be Assessed?,* CPI Antitrust Chronicle, May 2020.

[171] As per design to alleviate the economic risk associated with a concentration review.

[172] Philips, G. M., and Zhdanoc, pages 34-78.

[173] European Commission, 'Competition policy brief', April 2016, page 2.

[174] This will be the main topic of the following chapter.

could hypothetically mute innovation in the community market. However, this flexibility comes at the expense of companies, investors, and entrepreneurs subject to the EUMR, as exemplified by the following quote from a Commission policy brief:

> If competition policy promotes contestability (i.e., by keeping markets competitive) and does not unduly negatively affect appropriability, it will be compatible with Arrow and Schumpeter and therefore encourage innovation.[175]

To conclude this chapter, as the level of legal certainty decreases, the economic risks increase for concentrations as the sell and exit strategy tool becomes less specific and reliable. Therefore, the following step in this thesis is to analyze the GC's interpretation of the Commission's new approach in the Illumina/Grail judgment to determine if the new approach enhances or impairs innovation per Shapiro's three-principle theory and other relevant aspects.

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[175] European Commission, 'Competition policy brief', April 2016, page 2

4 The New Article 22, Evolution or Devolution of Competition Law?

4.1 Introduction: The Illumina/Grail Saga

In September 2020, Illumina Inc. (Illumina), a dominant genomics company manufacturing the Next Generation of Sequencing Systems (NGS) capable of conducting genomic analysis, announced its intention to acquire sole control of Grail Inc., a healthcare company endeavoring to produce a multi-cancer early detection (MCED) test based on the NSG system.[176] The press release proclaimed that the acquisition would "accelerate commercialization and adoption of a transformative blood cancer screening test."[177] Grail's sole focus on R&D had not yet generated turnover, and the concentration fell below the EU thresholds.[178] Conversely, the companies were obliged to file in the USA, and the Federal Trade Commission (FTC) quickly decided to sue to block the merger.[179] They theorized that the proposed concentration could diminish innovation in the US market for early detection liquid biopsy tests using DNA sequencing via foreclosing of Grail's potential competitors.[180]

Around the same time, the Commission sent a letter inviting Member States to refer to the Illumina/Grail acquisition under Article 22 of the EUMR. The Commission informed Illumina that they had received a referral request on the 11th of March.[181] On the 19th of April, the Commission accepted the request

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[176] Vestager, M., *Mergers: Commission prohibits acquisition of GRAIL by Illumina,* Brussels, Press release 6 of September 2022.

[177] Business Wire, *Illumina to Acquire Grail to Launch New Era of Cancer Detection*, Published September 21, 2020, available at <https://www.businesswire.com/news/home/20200921005256/en/>

[178] Vestager, M., *Mergers: Commission prohibits acquisition of GRAIL by Illumina,* Brussels, Press release 6 of September 2022.

[179] Federal Trade Commission, *FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail*, Press release of 30 March 2021, available at < https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection-test-maker-grail>, accessed on 10th of February 2023.

[180] Ibid.

[181] Court of Justice of the European Union, *The General Court upholds the decision of the Commission accepting a referral request from France, as joined by other Member States, asking it to assess the proposed acquisition of Grail by Illumina*, Luxembourg, Press release of 13 July 2022, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/cp220123en.pdf> accessed on 10th of February 2023.

from France, joined by Belgium, Greece, Iceland, the Netherlands, and Norway.[182] The scope of national merger regulations in the referring countries did not encompass the acquisition; that is, the acquisition was not notifiable in any of the referring countries. The Commission argued that "it was appropriate because Grail's competitive significance [was] not reflected in its turnover, as notably evidenced by the USD 7.1 billion-dollar deal value."[183] Consequently, Illumina attempted to appeal the referrals in both Dutch and French courts without prevail. The French administrative court rejected Illumina's appeal because only the EU courts had the authority to review the Commission's new interpretation of Article 22.[184]

Several Member States, including Spain, Austria, Slovenia, Ireland, Lithuania, and Latvia, established that they could not refer the acquisition because they lacked jurisdiction to scrutinize the merger under national regulations.[185] One Member State (Hungary) stated that they could not refer the case due to issues with legal certainty, especially considering that the new Article 22 Guidelines were not published until after notification of the merger.[186]

The Commission's investigation into the *Illumina/Grail* case was founded on an innovative theory of harm that Illumina had both the opportunity and incentive to engage in vertical input foreclosure strategies given its monopolistic market position in NGS technology.[187] The decision was appealed by Illumina, supported by Grail, utilizing three different pleas to support its action: (1) that the Commission lacks the competence to initiate an investigation based only on referrals from Member States which lack legal jurisdiction in national legislation; (2) that the referral request by France was made too late or alternatively that the delay in sending the invitation letter to the Member States undermined principles of legal certainty and the right to good administration; and (3) that the Commission infringed the protection of legitimate expectations due to the Commission's statement stressing that no change would occur until Guidance on Article 22 was published.[188] However, the General Court rejected the complaints and ruled in the Commission's favor.[189] Illumina, joined by Grail, has filed a formal appeal.[190]

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[182] See Vestager, M., *Mergers: Commission prohibits acquisition of GRAIL by Illumina,* Brussels, Press release 6 of September 2022.

[183] European Commission, *Daily News 20/04/2021,* Brussels, Daily news of 20 April 2021, available at < https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846>, Accessed on February 12th 2023.

[184] Conseil d'État, *lecture du 1 avril 2021*, ECLI:FR:CEORD:2021:450878.20210401, Decision n° 450878.

[185] Hirst, N. and McNelis, N., *Comment: Illumina-Grail deal reveals rift between EU competition authorities over M&A powers*, MLex, 20 April 2021, Available at <https://content.mlex.com/#/content/1285390>, accessed on 12th of February 2023.

[186] Ibid.

[187] Vestager, M., *Mergers: Commission prohibits acquisition of GRAIL by Illumina,* Brussels, Press release 6 of September 2022.

[188] GC's Judgement, *Illumina Inc. v Commission.*

[189] Ibid.

[190] 'Appeal brought on 22 September 2022 by Illumina, Inc. against the judgment of the General Court (Third Chamber, Extended Composition) delivered on 13 July 2022 in Case T-227/21, Illumina v Commission'*, OJ 2022/C 432/15*, page 13.

Interestingly, the US Administrative Court in California ruled in the opposite direction. They asserted that the FTC had failed to prove that Grail's potential rivals were poised to launch products that would directly compete with Grail's cancer detection test.[191] The FTC overruled this judgment, and the case is still ongoing in the US.

The judgment by the GC has resulted in a strong reaction from Member States, stakeholders, and practitioners alike. Especially noteworthy is that "the Estonian government has decided to intervene in the European Court of Justice on the side of Illumina and Grail, asking the EU's highest court to allow the merger between the two companies to proceed as planned."[192] Practitioners have expressed reservations about the Guidelines and judgment due to the lack of clarity, predictability, and, notably, the fact that concentration, which does not result in a notification obligation in referring Member States, should not qualify for an Article 22 referral under the current regulation, since it lacks an EU nexus.[193]

This chapter aims to evaluate the new approach by examining and critically analyzing the GC's interpretation of Article 22 of the EUMR. The chapter summary will compromise some concluding remarks and determination as to if the new approach is compatible with Shapiro's three principle model.

4.2 The First Plea: Lack of Legal Jurisdiction

Per the Guidelines, it is within the Commission's discretion to accept referrals from Member States even if a referred concentration does not satisfy the requirements for referral under national merger regulations. [194] In the first plea, Illumina and Grail challenged this interpretation.[195] Most of the judgment is devoted to this objection via literal, historical, contextual, and teleological interpretation methods.[196]

The GC's literal interpretation of Article 22(1) permits the Commission to consider such referrals.[197] The interpretation was partly established by analyzing the terminology utilized in Article 22(1), which states that 'any concentration' can be referred. The GC construed this to imply that any consolidation may be

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[191] Feder Trade Commission, *In the Matter of Illumina Inc., a corporation, and Grail, Inc., a corporation, Respondents, Initial Decision*, Docket No. 9301, Decision of 9 September 2022, pages 196-197.

[192] McNelis, *Estonia intervenes in the Illumina's EU court battle over referral of non-notifiable mergers,* MLex, 9 February 2023, Available at <https://content.mlex.com/#/content/1448496>, accessed on 11th of February.

[193] Kar, N., and others, *EUMR: Article 22 Position Paper*, European Competition Lawyers Forum, 15 October 2021. available at < https://www.europeancompetitionlawyers-forum.com/_files/ugd/b7d241_8b80397d103a4238b1879e695e4f351f.pdf>,

[194] European Commission, OJ 2021/C 113/01, paras 8-9.

[195] 'Action brought on 28 April 2021 – Illumina v Commission, 2021/C 252/37, and GC's Judgement, *Illumina Inc. v Commission.*, paras. 85-184.

[196] GC's Judgment, *Illumina Inc. v Commission.*, paras 85-184.

[197] Ibid., paras. 89-95.

referred, regardless of limitations in national merger regulation.[198] Despite acknowledging that Article 22(3) of Regulation No 4064/89 aimed to safeguard Member States that lacked merger control regulations, the GC contends that this provision was never intended to prohibit referrals to the Commission by Member States with national merger regulations, even if the merger concentration falls short of the criteria for national review. [199]

Furthermore, the GC states that the revision of Article 22 Regulation No. 4064/89 to permit joint referrals aimed to strengthen the one-stop-shop principle and widen the scope of the EUMR to allow the Commission to assess additional cross-border transactions.[200] They support this assertion by comparing Article 22 to Article 4(5), which permits parties to request a referral only if three Member States have jurisdiction to review the concentration under national law.[201] The GC stresses that the omission of such conditions from Article 22 constituted a deliberate attempt to expand its scope to allow the Commission to accept referrals from Member States of any concentrations with substantial cross-border effects.[202] According to the GC, this provides flexibility for assessing concentrations that could significantly impede effective competition in the internal market, which is necessary due to the rigid nature of the turnover-based merger regulation.[203] The GC unearthed that there are no indications that the legislators intended to restrict the Commission's jurisdiction to accept referrals only from Member States with national authority to review mergers.[204] The judgment provides numerous sources to support this claim, including the recitals of the EUMR, *Kesko v Commission*,[205] and relevant Green Papers.[206]

To summarize, the GC found that the requisites for the Commission to accept a referral request as per Article 22(1) of Regulation 139/2004 were that:[207]

- A referral must be made by one or more Member States
- The subject under scrutiny must satisfy the definition of "concentration" as outlined in Article 3 of the EUMR.
- The concentration cannot have an EU dimension as per Article 1 of the EUMR
- The concentration must affect trade between Member States

[198] Ibid., paras. 89-91.
[199] Ibid., paras. 96-117.
[200] Ibid., paras, 101, 119 and 140-151.
[201] Ibid., paras. 125-126.
[202] Ibid., para 126.
[203] Ibid.
[204] Ibid., paras 83-185.
[205] GC's Judgment, *Kesko Oy v Commission*, para 86
[206] GC's Judgment, *Illumina Inc. v Commission*, paras, 96-117, and Green Paper, COM(96) 19 and Green Paper) COM(2001)745.
[207] GC's Judgment, *Illumina Inc. v Commission*, para. 89.

- The concentration should pose significant anti-competitive effects on competition within the Member States that make the referral.

4.2.1 Discrepancies in the GC's Interpretation

In the *Illumina/Grail* judgment, the GC claims that there is no evidence in current regulation or historical papers which suggest that Member States cannot refer concentrations that fall below existing national thresholds. However, further examination reveals that some aspects of the argument favor one side without considering the opposing view equally. Indeed, there are features that support Illumina and Grail's opposing claims.

For instance, recital 15 of the EUMR establishes that:

> "A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States which <u>are also competent to review the concentration</u> should be able to join the request." [Emphasis added].

The word 'also' explicitly indicates that a Member State must be competent to review the merger to submit a referral. Notably, the first sentence in the quote explicitly targets Article 22 of the EUMR. Nevertheless, the GC disregards the underlined part of the recital, insisting that recital 15 of the EUMR enforces that the application of Article 22 differs from that of Article 4(5) of the same regulation.[208]

Moreover, the GC emphasizes that the Green Paper upholds the objective of Article 22 to reinforce the one-stop-shop principle and the Commission's ability to scrutinize mergers with cross-border effects. The GC argues that the 2001 Green Paper does not suggest that the EU legislators aimed to limit Article 22's scope to Member States without merger regulation.[209] However, they fail to consider that the Green Paper from 2001 also underscores that Article 22 enables Member States to request the Commission to "step into its shoes," thus referring to a transfer of authority between NCAs and the Commission.[210] There are, of course, no shoes to step into if the NCA themselves have no authority to review a specific transaction.[211] Although the GC acknowledges that the principle of best-placed authority enhances the one-stop-shop principle and expands the Commission's ability to review mergers with cross-border effects, their judgment

[208] Ibid., paras. 145-146.
[209] Ibid., para. 98.
[210] Green Paper, COM(2001)745, para. 84.
[211] See also: European Commission, 'Notes on Council Regulation (EEC) 4064/89', published in *Merger control law in the European Union*, Brussels- Luxembourg, 1998, available at < https://ec.europa.eu/competition/mergers/legislation/notes_reg4064_89_en.pdf>, page 5, "The Council and the Commission state that the provision of Article 22 (3) and (5) in no way prejudice the power of Member States other than that at whose request the Commission intervenes to apply their national laws within their respective territories."

primarily focuses on the latter two aims, disregarding the complementary nature of the principles.[212]

To conclude this section, the EUMR and historical documents contain elements that challenge the compatibility of the Commission's new interpretation. The disregard of these elements by the GC raises doubts about the objectiveness of their judgment.

4.2.2 The New Approach Could Fragment the Internal Market

The principle of subsidiarity is manifested in Articles 3 and 5(3) of the TEU and implemented by Protocol (No 2). This principle safeguards Member States' jurisdiction when an objective can be sufficiently achieved at the national level as long as the EU does not have exclusive competence. The EUMR is partially based on Article 352 TFEU,[213] whereby it does not fall within the EU's exclusive jurisdiction, meaning that the authorities of the EU have shared responsibility with the Member States.[214] Therefore, EU authorities should only intervene when the goals of the proposed action cannot be accomplished effectively by the Member States due to the magnitude of impact. As illustrated above, the magnitude of impact is, as a general rule, measured through turnover in merger cases except when a transaction falls within the scope of one of the corrective mechanisms. In such cases, the Guidance reiterates that "the Member States and the Commission retain considerable discretion in deciding whether to refer cases or accept referrals."[215]

The GC's teleological interpretation of Article 22 is that its primary purpose is to facilitate efficient regulation of any concentration that has significant cross-border effects within the EU.[216] Given that the Commission is restricted to the jurisdiction of Member States that have requested it, the principle of subsidiarity is maintained, as per the GC's judgment.[217] However, this section of the thesis will contend that the consequences of this construal are incompatible with the principle of subsidiarity and other related principles.

Several Member States, including Spain, Austria, Slovenia, Ireland, Lithuania, and Latvia, found that they lacked legitimate jurisdiction to review the *Illumina/Grail* merger under national law and, therefore, could not refer the case.[218] As a result, it is plausible to categorize the Member States into three separate groups: (1) Member States that cannot refer non-notifiable cases, (2) Member States that can refer non-notifiable cases, and (3) Member States with complementary threshold systems that enable them to review particular nascent

[212] GC's Judgment, *Illumina Inc. v Commission*, para 103.
[213] Jones, A, Sufrin, B & Dunne N, p. 93.
[214] See Illumina/Grail v Commission, para. 157 and recital 11 of the EUMR.
[215] European Commission, OJ 2021/C 113/01, para. 3.
[216] GC's Judgment, *Illumina Inc. v Commission*, paras. 140-151.
[217] Ibid., paras. 157-166.
[218] Hirst, N. and McNelis, N., *Comment: Illumina-Grail deal reveals rift between EU competition authorities over M&A powers*.

acquisition, permitting them to choose whether to refer nascent concentrations to the Commission or whether to review such concentrations nationally.[219]

The German Federal Ministry for Economic Affairs and Energy issued a legal opinion concerning Article 22 as a means to review nascent acquisitions.[220] In the opinion, they expressed concern about the potential impact on the EU's internal market due to the differing interests of Member States.[221] Additionally, the legal opinion highlighted that for the Commission to evaluate the impact of a referred concentration on a Union level, the Commission requires referrals from all Member States - which demands extensive resources.[222] Consequently, a Commission's decision originating from an Article 22 referral may not be compatible with the principle of subsidiarity if it undermines the interests of Member States that choose not to, or cannot, refer a concentration. The new approach, therefore, enables the Commission to undermine national decisions or the legal scope set by national legislators. This is a flaw that renders the new approach incompatible with the principle of subsidiarity, which holds that national authorities should maintain jurisdiction of a matter if they are the more appropriate authority. This, coupled with the mere fact that the new approach tool is not compatible with the legal framework in all Member States, suggests that the approach is not compatible with Article 4(2) of the TEU, which mandates that the Union is to "…respect the equality of Member States before the Treaties… inherent in their fundamental structures, political and constitutional". Therefore, the new approach, established through soft law, appears to unfairly disadvantage Member States that are unable or unwilling to utilize the referral mechanism as opposed to those that have the ability and the willingness to do so. It is reasonable to question whether the implementation of the new approach should have required a legal amendment in the EUMR to ensure that all Member States had a say in the development of the new competition tool.

On a related note, the new approach conflicts with the one-stop-shop principle by promoting additional parallel processes on both national and EU levels.[223] This issue can be illustrated with the *Meta/Kustomer* case, where the German

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[219] In the Meta/Kustomer Case Germany, which have complementary transaction-based thresholds, had to determine whether the concentration fell within the scope for national scrutiny, and was therefore not able to meet the 15 working day deadline. See Franck, J., Monti, G., Streel., A, *Article 114 TFEU as a Legal Basis for Strengthens Control of Acquisitions by Digital Gatekeepers*, the Federal Ministry for Economic Affairs and Energy, Berlin, Legal Opinion of 20 September 2021, pages 26-28, Available at https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/article-114-tfeu-as-a-legal-basis-for-strengthened-control-of-acquisitions-by-digital-gatekeepers.pdf?__blob=publicationFile&v=5>, and Case M.10262, *Meta/Kostumer*, Commission Decision of 27 of January 2022 and Bundeskartellamt, *Bundeskartellamt clears acquisition of Kustomer by Meta (formerly Facebook),* Press release of 11 February 2022, available at <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.html>, accesses on 20th of February 2023.

[220] Franck, J., Monti, G., Streel., A., pages 24-28.

[221] Franck, J., Monti, G., Streel., A., page 27.

[222] Ibid., page 27.

[223] Observe that Recital 11 of the EUMR especially states that the rules governing referrals should be used as an effective corrective mechanism used in the light of, *inter alia,* the one-stop shop principle.

competition authority could not turn in a referral on time because they had to test if the criteria of their *transaction-based* thresholds were met first, which they were.[224] As a result, the case was reviewed in parallel by the Commission and the German competition authority.[225] Accordingly, concentrations that fall under the criteria outlined in the Guidelines will have to consider the possibility of being referred under Article 22 parallel with numerous national investigations, with different outcomes - further decreasing appropriability due to the increased risk associated with the sell and exit strategy. Although when a referral is submitted, the Commission will consider whether it has already been notified in other Member States according to the Guidelines.[226] However, the Guidelines do not clarify to what extent this will be taken into consideration.

In conclusion, this thesis asserts that the fragmentation in the internal market that may result from the new approach is incompatible with the principles of equality between Member States in Article 4(2) of the TEU, the principle of subsidiarity in Article 5(3) of the TEU and the one-stop-shop principle. The main concern originates from the fact that the Commission's responsibility is limited to assessing if the *prima facie* analysis meets the conditions set in the Article 22 Guidelines,[227] not whether a possible reviewal might undermine the interests of Member States that have not or cannot refer the case. This also raises the question of whether a powerful multi-layered European institution serving as judge, legislator, and enforcer should have the margin of discretion to prompt an approach with the described deficiencies. Indeed, the Commission's need for a flexible corrective mechanism is understandable. However, the findings in this section suggest that such a tool should have been established in the traditional legislative procedure so that supranational negotiations could have taken place to properly allocate the competence between NCA:s and the Commission in a fashion that is compatible with the EU Legal framework.[228]

4.2.3 The New Approach Gives Rise to Legal Uncertainty

The principle of legal certainty constitutes a foundational element in EU law, enshrined in Article 2 of the TEU. The principle requires that the law be clearly and precisely defined to allow individuals, companies, and organizations to anticipate their legal outcomes.[229] As a result, this principle ensures that the law is stable, coherent, and foreseeable, providing individuals with a sense of security (legitimate expectations)[230] and trust in the legal system. Both Member States and

[224] Commission's decision, *Meta/Kostumer.*

[225] Bundeskartellamt, *Bundeskartellamt clears acquisition of Kustomer by Meta (formerly Facebook)*

[226] European Commission, OJ 2021/C 113/01, para 22.

[227] GC's judgment, *Kesko Oy v Commission*, para 86.

[228] As indicated by the fact that Estonia has publicly denounced the approach, See McNelis, *Estonia intervenes in the Illumina's EU court battle over referral of non-notifiable mergers*.

[229] See: Case C-72/10 *Criminal Proceedings against Costa*, EU:C:2012:80, para 74; Case C-110/03, *Belgium v Commission*, EU:C:2005:223, para 30 and Case C-308/06, *Interanko and Others*, EU:C:2008:312, para 69.

[230] The principle of legitimate expectations can be seen as a founding principle incorporated within the principle of legal certainty. This principle will be reviewed in Section 4.4.

the EU institutions must uphold legal certainty and foreseeability.[231] Furthermore, the principle of legal certainty is fundamental in cases that burden the scrutinized party economically.[232] In this regard, authorities must consistently apply laws and regulations that conform to established legal precedents and avoid creating any unintentional legal ambiguity that can harm their subjects.[233]

The Commission's new interpretation has significantly broadened the scope of Article 22, while the original intent was to address competition concerns within one Member State. This raises the question about the legality of the Guidance. A supplementary question is whether Article 22, in addition to the Guidance, is sufficiently clear for an undertaking concerned with assessing the risk of possibly being subject to a referral by the Commission. Especially since the Commission has, as its established general practice, previously discouraged referrals of concentration that fall below the turnover thresholds.

To answer the first question, the Commission's established practices do not constitute a legal framework according to case law. Still, by virtue of the principle of equal treatment, the Commission should not treat comparable situations differently unless objectively justified. Nevertheless, the Commission can change its established practices to adopt new soft laws as part of its discretion. For example, in the Case of *Amann & Söhne and others v Commission,*[234] the Commission issued Guidelines that changed its practice and method of determining fines. The GC held that the Commission could depart from its established practices to implement the new policy.[235] Consequently, the principle of legal certainty cannot be relied upon by parties to reverse a change in the Commission's established practices through guidelines or similar publications.[236] By analogy, the change to the Commission's established practice regarding Article 22 also does not constitute a breach of legal certainty.

However, it might be argued that the new approach is unclear and not sufficiently precise. This aspect will be explored further in the following subsections.

4.2.3.1 It is Unclear What Concentrations will be Subject to Referrals

The Guidelines specify that a preliminary analysis must demonstrate that the proposed transaction will likely significantly affect competition.[237] Due to its limited applicability to cases involving significant cross-border effects that are

[231] Joined cases C-487/01, *Gemeente Leudsden* and Case-7/02 *Holin Groep*, EU:C:2004:263, para 57; Case C-376/02, *Goed Wonen*. EU:C:2005:251, para 32 and Case C-181/04 to C-181/04 to C-183/04, *Elmeka NE*, EU:C:2006:563, para 31.

[232] Case 325/85, *Ireland v Commission,* EU:C:1987:546, para 18 and Case C-183/14, *Salomie and Oltean*, EU:C:2015:454, para 31.

[233] Recital 22 of the EUMR also reiterated that the Commission must adhere to the principle of legal certainty when applying EUMR.

[234] Case T-446/05, *Amann & Söhne and others v the Commission*, EU:T:2010:165 para 146. See also joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rorindsutri and other v Commission,* EU:C:2005:408.

[235] Ibid., para 211-213.

[236] See Cases T-31/99 *ABB Asea Brown Boveri Ltd v Commission*, EU:T:2002:77 para 112 and CJEU's judgment, *Dansk Rorindsutri and other v Commission,* para 171.

[237] European Commission, OJ 2021/C 113/01, para 15.

particularly problematic, Article 22 has acquired an aura of exclusivity.[238] Although the Guidelines are aimed at preventing transactions that may eliminate potential future competitors or reduce a competitor's abilities or motivation to compete,[239] it appears that the 'illustrative' factors for the *prima facie* review, as outlined in the Guidelines, indicate a level of risk that justifies additional scrutiny of a concentration.

Although the Notice and Guidelines state that Article 22 is only to be used in exclusive transactions that may have a significant detrimental effect on competition,[240] the *Illumina/Grail* case indicates a low standard for referral acceptance. The initiation of the Article 22 process in *Illumina/Grail* was motivated by concerns concerning the potential elimination of Grail's competitors in the market for MDEC tests using NGS technology, foreseeing adverse effects on future cancer patients in Europe.[241] However, the decision in the US revealed no other workable alternative for NGS-based MCED tests on the market in the foreseeable future.[242] Furthermore, Illumina, which provides NGS technology, had no other viable competitors at the time of the *prima facie* review.[243] Even if the concentration could introduce the NGS-based MCED test in the EU and impact the Member States' trade, it is questionable whether a *prima facie* review would generate exceptional concerns since neither Illumina nor Grail had potential competitors in the NGS / MCED market in the foreseeable future.[244] Additionally, the availability of NGS technology is critical for developing this type of MDEC technology, which further emphasizes the need to consider the impact of the concentration carefully.

The present dilemma is determining the scope of the implementation of Article 22 as an 'exclusive' measure in light of the unambiguous terms used in the Article and the Guidance. Specifically, should Article 22 be used to scrutinize the more critical competition cases that pose an obvious potential threat to dynamic competition, such as obvious killer acquisitions in the pharmaceutical market or conglomerate nascent acquisitions in the digital sector that could restrain innovation at the *prima facie* stage,[245] or, is the exclusivity of Article 22 diminishing, leading to its use in any merger has the potential to cause harm to any sector of

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[238] European Commission, OJ, 2004/C 101/07, paras 13, 14 and 45. Especially para 13 which reiterates that a: "referral should normally be made when there is a compelling reason for departing from 'original jurisdiction'… particularly at the post-notification stage".

[239] European Commission, OJ 2021/C 113/01, para 15.

[240] As illustrated in Sections 3.4.3.1 and 3.4.3.2.

[241] European Commission, *Mergers: Commission opens in-depth investigation into proposed acquisition of Grail by Illumina*, Brussels, Press release of 22 July 2021, available at < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3844>.

[242] Switching from NGS to an alternative technology would be a very costly move according to Feder Trade Commission*,* Docket No. 9301, page 153.

[243] Illumina, *Wins Patent Infringement Suit against BGI in the UK,* Press release of 20 January 2021, available at <https://www.illumina.com/company/news-center/press-releases/2021/924a93cb-2ddc-429a-8d4b-984909459305.html>.

[244]See European Commission, OJ 2008/C 56/01, para. 45; European Commission, OJ 2021/C 113/01, para 15 and Feder Trade Commission, Docket No. 9301, page 153.

[245] As alluded to in the Guidelines.

the new economy? The Guidelines indicate the former, while the invitation and acceptance of the *Illumina/Grail* case indicate the latter.

Unfortunately, the GC does not elaborate on how the *prima facie* requirement was met in the *Illumina/Grail* case, although it can infer that the standard set by the judgment is low.[246] However, this might be justified considering the Commission's extended power of discretion to decide what mergers to pursue.[247] Nevertheless, the GC's interpretation would indicate that all concentrations in the new economy markets, whether containing an EU nexus or not, could be subject to scrutiny by the Commission through Article 22, even though there are plenty of sources that clarify that Article 22 should only be utilized in exceptional circumstances, due to reason of legal certainty. Therefore, the precision of the new approach is in question, as it permits a broad range of mergers that would not typically meet the qualifications under the Merger Regulation. This suggests that a more targeted approach should be taken toward certain mergers to increase legal certainty.[248]

4.2.3.2 Time-Period in Which the Commission can Accept Referrals is not Defined.

The Guidelines state that, in general, referrals will not be accepted after six months of closing unless the consequences for the consumer would be especially severe.[249] The Commission also indicated that they will consider the duration elapsed since closing as a factor for accepting referral requests.[250] The unspecified criteria increase the economic and legal risks for concentrations that could become subject to Article 22 referrals.[251] These ambiguities could be remedied by specifying a time period for the Commission to accept referrals.[252] Additionally, Article 22 referrals, as alluded to above, should only be used in exceptional circumstances as it is. Therefore, the Commission must clarify further what type of concentrations they consider especially harmful to consumers and thus warrants scrutiny at such a late stage.

Another issue in this regard is that the Commission is not authorized to enforce a standstill obligation as per Article 7 of the EUMR until it accepts a referral of a concentration without an EU dimension.[253] Therefore, the Commission will have to rely on the undertakings' cooperation to terminate their post-closing plans while the Commission considers the concentration for review. The primary concern is what would happen if a concentration closes the deal before the

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[246] At the time this paper is written the Commission's decision on the case has not been published, therefore, the examination of the *prima facie* review in Illumina/Grail is limited to what is states in the GC's judgment.
[247] European Commission, OJ 2021/C 113/01, para. 3.
[248] This will be discussed further in Chapter 5.
[249] Ibid., para 21.
[250] Ibid.
[251] Regarding economic risks associated with unwinding a closed merger see OECD, *Start-ups, Killer Acquisitions and Merger Control*, page 47.
[252] See Kar, N., and others, paras. 4.11-4.18.
[253] Therefore, the Commission would not be able to lean on the gun jumping provisions in Article 14(2)(b) of the EUMR, or the power to enforce interim measures in Article 8(5)(a) of the EUMR.

Commission accepts an Article 22 referral. In such a scenario, the Commission would likely have to accept the referral, complete the investigation, and declare the concentration incompatible with Article 8(3) of the EUMR. This would force the concentration to unwind under Article 8(4) of the EUMR, which could lead to substantial economic costs for the undertakings concerned. A solution to this issue might be to include a provision in the Guidelines that obligates the Commission to inform a concentration being considered for an Article 22 referral before its closure. However, some cases may be referred directly by the Member States to the Commission, unlike the *Illumina/Grail* case, where the Commission received third-party information prompting an invitation letter to the Member States for a referral. To ensure Article 22's effectiveness and systematic coherence, the Commission must collaborate closely with NCAs to ensure that information reaches concentration before closing.

4.2.3.3 Early Indication Procedures are Too Vague

The Guidelines contain a provision that enables companies to reach out to the Commission to obtain an advanced indication of their likelihood of being subject to an Article 22 referral if deemed appropriate.[254] Purchase agreements between undertakings require various provisions to allocate risk properly,[255] highlighting the need for an effective early indication procedure to remedy the ambiguity of the new interpretation. An important aspect is whether the party's assurance is binding in terms of legitimate expectations and whether the parties can reach out on a no-name-basis during negotiations, pre-closing. Moreover, it is crucial to consider the circumstances under which the Commission does not deem it appropriate to give an early indication.[256] Therefore, the early indication mechanism in the Guidelines has not remedied the legal uncertainty.

4.3 The Second Plea, GC's Interpretation Conflicts With the One-stop-shop Principle

In the *Illumina/Grail* case, the French competition authority sent the referral to the Commission on the 9th of March, 2021 - almost six months after Illumina announced their intention to acquire Grail. Even though notifications must be submitted to the relevant Member State within 15 working days, after which the concentration was 'made known' to the Member State, the Commission accepted the submission.[257] Both Illumina and Grail argued that the 15-day countdown

[254] European Commission, OJ 2021/C 113/01, para. 24.
[255] In regard to the allocation of risk see: Modrall, J.R., chapter 25, pages 12, 15, 22 and 26-36.
[256] See Kar, N., and others, paras. 4.7-4.10.
[257] Article 22(1): A referral "...shall be made at most within 15 working days of the date on which the concentration was notified, or, if no notification is required, otherwise made know to the Member states concerned."

should have begun on the 21st of September 2020, when the acquisition was publicly announced.

According to the GC's contextual interpretation, the term 'made known' implies the active transmission of relevant information to the concerned Member State. [258] The information provided must be sufficient for that Member State to carry out a *prima facie* assessment based on the conditions in Article 22(1), which is similar to the substance required during the notification of a merger.[259] The GC supports this argument by pointing out that the provision laid out in Article 22, and other corrective mechanisms, intend to trigger the countdown similar to that of the notification system.[260] In conclusion, the GC determined that the countdown period for the *Illumina/Grail* case began when the invitation letter was issued. Interestingly, the GC observed that the 47 days between receiving the receipt of the third-party complaint and the dispatch of the invitation letter to the Member States could be regarded as unreasonably late.[261] Nevertheless, the Court ruled that despite the late invitation letter, the decision made by the Commission did not warrant nullification considering the adverse competitive effects that the merger could cause. Furthermore, they claim that this interpretation is supported by a teleological interpretation, citing Recitals 11 and 14 to emphasize that the referral of concentration must be done efficiently.[262]

However, the GC does not acknowledge the consequences of its interpretation. Recitals 11 and 14 underline that the corrective mechanisms are to be used in the light of, among other things, the one-stop-shop principle.[263] The GC and the Commission interpretation contradicts this principle as concentrations that meet the prerequisites in Article 22 would be required to submit sufficient information to each Member State to start the 15-workday countdown, resulting in a substantial number of filing-like actions (considering that the GC equates the active transmission with filing a notification). Subsequently, the conditions coupled with the term 'made known' must be clearly defined in the Guidelines, preferably in a way compatible with the one-stop-shop principle.

4.4 The Third Plea: Violation of Legitimate Expectations?

Illumina and Grail claimed that the shift in interpretation was unexpected, given Commissioner Vestager's speech in September 2020,[264] particularly considering

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[258] GC's Judgment, *Illumina Inc. v Commission*, para 204.
[259] Ibid. paras 199-204.
[260] Ibid. paras 199-200.
[261] Ibid. para 239.
[262] Ibid. para 206: "It is apparent from recital 11 and 14 of Regulation NO 139/204 that the referral of concentrations should be made in an efficient manner".
[263] It is additionally worth emphasizing that recital 14 pertains solely to Article 4(5) of the EUMR and not to Article 22.
[264] Vestager, M., *The future of EU merger control*, Speech of 11 September 2020: "It won't happen overnight."

that the Guidance Paper was released after the public announcement of the concentration and after the dispatch of the Invitation Letter. In their plea, they defined the Commission's behavior as a breach of the principle of legal certainty and legitimate expectations. The GC treated the argument only in regard to legitimate expectations in line with the described course of events on which the Illumina and Grail relied upon.[265]

The GC determined that the statement made by Commission Vestager in her speech did not meet the criteria outlined in case law concerning legitimate expectations, as it was not a direct comment on the case itself. To rely on the principle of legitimate expectations, "precise, unconditional, and consistent assurances" originating from authorized, reliable sources must be given to the parties concerned.[266] Therefore, the argument that the Commission violated the principle of legitimate expectation was rejected on reasonable grounds.

However, it can be argued that in the case of *Illumina/Grail*, the Commission's decision could potentially violate the principle of equal treatment since the Commission treats comparable situations differently. When Illumina announced its intention to acquire Grail and when the parties negotiated how to allocate the economic risk associated with the merger, the only Guidelines available concerning the acceptance of referrals from Article 22 of the EUMR were purely based on the established practice as the new Guidance had not been published yet. It is also noteworthy that Commissioner Vestager had explicitly stated that the new approach would wait until there were Guidelines to ensure legal certainty. Therefore, the concentrations had no reason to think that the Commission would allow referrals until after further Guidance had been published.

4.5 Chapter Conclusion

This section has established some discernable concerns with the new interpretation. As previously mentioned, it is imperative for businesses embarking on a merger to accurately anticipate potential risks so that they can be addressed in the contract negation process before closing. One notable example is the broad scope of mergers that could trigger innovational concerns, as indicated in the Guidelines. The criteria given are general, vague, out of line with the one-stop-shop principle, and in part uncoherent with fundamental principles in primary law, the recitals, and the historical purpose of the EUMR. The ambiguous criteria found in the Guidelines, which could also enclose unproblematic mergers, are particularly intriguing when contrasted with the strict stance that Article 22 of the EUMR should only be utilized in exceptional cases, as evidenced in the Guidelines.[267]

[265] 'Appeal brought on 22 September 2022 by Illumina, Inc. against the judgment of the General Court (Third Chamber, Extended Composition),OJ 2022/C 432/15

[266] GC's Judgment, *Illumina Inc. v Commission*, para 252.

[267] European Commission, OJ 2008/C 56/01, para. 45.

As mentioned above, a competition policy brief by the Commission established that innovation on the market is encouraged as long as merger regulation maintains market contestability without unduly adverse effects on appropriability.[268] The new approach causes a decline in appropriability within the new economy markets due to the multitude of legal ambiguities in the Guidelines. The Commission's discretionary power to scrutinize and select mergers regardless of existing legal thresholds could hinder the ability of practitioners and companies to predict whether they will be investigated, which may impact a firm's incentive for selling and exiting. As a result, investors could be deterred from fully benefiting from their innovations and investments, resulting in reduced appropriability and potential ability to innovate due to decreased incentive and ability to merge to reap the benefits of synergies.[269]

These risks are exemplified by the merger regulation in Sweden, where any merger can voluntarily notify the Swedish Competition Authority (SCA) of the merger if they meet certain conditions two years after the merger has taken place.[270] In Sweden, the criteria for reviewing mergers that satisfy part of the thresholds is that there are "particular grounds" for doing so. Like the new interpretation of Article 22, this is also very ambiguous. According to a position paper by established practitioners, systems relying on voluntary filings to fill the legal uncertainty gap depended heavily on the authority's ability to conduct clear communications.[271] By analogy, the efficiency of an early indication system would also require clear communication from the Commission. Since neither the Guidance nor the judgment provides clarification concerning time limits or provides clear communication procedures between concentrations, the Commissions, and NCAs, appropriability is undoubtedly affected, and synergetic mergers could be considered too risky by stakeholders, resulting in less innovation in the market.

In addition, it does not seem like the decrease in appropriability will be balanced out by increased contestability, as Commissioner Vestager has emphasized that Article 22 will not be used often.[272] Should the statement be true, there may very well be a continued decline in contestability across most markets, even with the recent implementation of Article 22 Guidelines, since very few mergers will be reviewed this way.

To address the third research question, there is a possibility that the Commission's revised Article 22 strategy may result in unintended consequences. Specifically, rather than facilitating dynamic markets, it could hinder synergistic transactions due to increased risks associated with uncertainty due to low levels of appropriability and unchanged levels of contestability in the markets where the

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[268] European Commission, *Competition policy brief.* April 2016, page 2.

[269] "Biocom says the EU's "expanded approach" to reviewing mergers, if upheld by the court, will "make it more difficult for small, new and growing businesses to find investors, due to the unpredictability inherent in the new interpretation." (Statement by Panetta, J., in Business Wire, *Biocom California State on Illumina's Proposed Acquisition of Grail*" California, 28 March 2023.)

[270] See the Swedish Competition Act (2008:579), chapter 4, para. 6 in combination with para 7.

[271] Kar, N., and others, pages 12-13.

[272] Vestager, M., *Merger Control: the goals and limits of competition policy in a changing world".* Florence, Speech of 9 September 2022

referral system is not utilized. Nevertheless, as studies in Chapter Two indicate, the Commission needs a tool to capture possible killer acquisitions in specific sectors successfully. Preferably a solution that teleologically fits within the EU framework; that is, with a higher level of legal certainty, and does not interrupt the one-stop-shop process or fragment the internal market. Such a solution could increase the new approaches' compatibility with fundamental principles concerned with upholding the internal market, appropriability and give additional room for synergetic mergers while catching the harmful concentrations involving nascent firms.

5 Alternative Regulatory Solutions to Catch Nascent Acquisitions

5.1 Introduction

Given the legal ambiguity and reduced appropriability arising from the revised interpretation of Article 22, this concluding chapter aims to consider alternative measures that might grant the Commission the flexibility necessary to tackle the issue of nascent acquisitions. In an ideal scenario, the proposed measures should bolster contestability, appropriability, and synergies in the market while simultaneously targeting mergers with a high risk of eliminating rivals in both horizontal and vertical markets. Four approaches will be evaluated in these sections, selected for their potential to increase innovation in the market.

5.2 Ex-post Approach

The corrective mechanism in Article 22 and quantifiable thresholds have been essential for ensuring legal certainty and effectiveness. Rather than expanding Article 22 of the EUMR in a questionable manner to address concentrations involving incumbent's acquisitions of start-ups, a more viable option might be to implement an ex-post mechanism. This approach could prove more effective since it would be easier to determine if foreclosure or elimination of competition has occurred in relation to a merger, compared to an ex-ante review, which relies heavily on empirical evidence that shows that a company will have the ability and incentive to act anti-competitively.[273] Therefore, by adopting such an approach, the authorities reduce the risk of over-enforcement while ensuring that mergers do not lead to anti-competitive outcomes, which can harm the market and hinder innovation.

Numerous countries already utilize varying types of ex-post mechanisms to scrutinize mergers.[274] However, the ex-post mechanism in the United States stands out in relation to other countries, as it allows the FCA to review mergers

[273] For instance, in the Du/Pont case the Commission found letters indicating the plan to shut down innovation within the agriculture section after the merger. However, in the Facebook/WhatsApp case harmful effects of the merger did not emerge until years later.
[274] For example, Sweden, Ireland, Lithuania, UK, US, Hungary, and Norway - OECD, *Start-ups, Killer Acquisitions and Merger Control*, page 47.

for an unlimited time period after the completion of the merger.[275] It should be noted that an ex-post system with an indefinite duration can conceivably heighten the degree of legal ambiguity by exposing the merger to a disproportionally lengthy period during which the concentration risk scrutiny. In addition, it is difficult to unwind organizational integrations to reverse a merger, as emphasized by the Organization for Economic Cooperation and Development (OECD) report concerning killer acquisitions.[276] Nevertheless, other countries with an ex-post mechanism have established a time limit for their ability to conduct an ex-post review. For instance, the UK requires intervention within four months, and in Canada the review must be completed within one year of the merger.[277]

5.2.1 Article 102 of the TFEU Suitable to Catch Nacent Acquisitions?

5.2.1.1 TowerCast

The possibility of scrutinizing mergers not covered by national and EU thresholds by utilizing Article 102 of the TFEU (Article 102) has gained significant attention in recent years. This approach involves preventing dominant undertakings from acquiring competitors to enhance their dominant position further, weakening the stance of their current or future potential competitors. The CJEU established the precedent for using Article 102 on concentrations in *the Continental Can* case. [278] However, the introduction of the EUMR led to the general rule that the EUMR applies exclusively to concentrations with EU dimensions (Article 21 of the EUMR), thus excluding national review and the application of Articles 101 and 102 of the TFEU.[279]

The option to utilize Article 102 to capture harmful mergers between incumbents and nascent firms was explored in a preliminary ruling in the case between TowerCast and the French Autorité de la Concurrence and Ministère de l'Économie. A French incumbent broadcaster, namely TDF, acquired a smaller rival. At that point, TowerCast implored the French authorities to step in because the mergers supposedly constituted a 'killer acquisition' that could impede TowerCast's ability to compete in the market. Consequently, the French Court forwarded the inquiry of whether Article 21(1) of the EUMR prohibits national authorities from examining mergers that (1) do not have an EU dimension and (2) have not been referred via Article 22 to the CJEU, considering it as an abuse of dominant position banned under Article 102. The CJEU confirmed, in line with

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275 OECD, *Investigations of Consummated and Non-notifiable Mergers*, 25 February 2014, DAF/COMP/WP3(2014)1, Available at < https://one.oecd.org/document/DAF/COMP/WP3(2014)1/en/pdf>, page 8, para. 17.

276 OECD, *Start-ups, Killer Acquisitions and Merger Control*, page 47: the report refers to the Evanston & Highland Park Hospitals which was investigated 7 years after the merger took place.

277 Ibid.

278 Case-6/72, *Continental Can Company Inc. v Commission,* 1973, EU:C:1973:22, para 26.

279 See Article 21(1) of the EUMR, Jones, A, Sufrin, B & Dunne N, page 1097.

Advocate General Kokott's opinion, that a concentration without an EU dimension may be subject to ex-post control on a national level due to the direct effect of Article 102.[280]

Ultimately, the TowerCast judgment implies that NCAs can evaluate a concentration under Article 102. This suggests that Member States have a potential tool to scrutinize potentially anti-competitive nascent acquisitions as long as one of the undertakings is a dominant player on the national market.

5.2.1.2 Nascent Acquisitions: An Abuse of Dominance?

For Article 102 to effectively address nascent acquisitions harmful to dynamic competition, it is crucial to establish whether these acquisitions can be deemed an abuse of dominance.[281] The Article 102 Guidance does not explicitly refer to nascent or killer acquisitions; however, it clarifies that anti-competitive practices that restrict actual or potential competitors' access to markets or supplies, impede competition, and increase profitability for a dominant undertaking, fall within the scope of Article 102.[282] Indeed, this is very similar to the theory of harm utilized by the Commission in the *Illumina/Grail* case.[283] Furthermore, the ruling by the CJEU in the *Continental Can* case asserts that Article 102 must be understood in the context of the Treaties; hence any conduct that disrupts competitive proceedings constitutes an abuse of dominance. For instance, foreclosure using loyalty rebates was the central theory of harm in *Intel v Commission*.[284] Furthermore, the Communication and accompanying case law underline that a far-reaching responsibility not to behave anti-competitively surrounds dominant incumbents.[285] This suggests that anti-competitive nascent acquisitions fall within the vast framework for Article 102.

5.2.1.3 Possibility for the Commission to Utilize Article 102 as an Ex-post Tool

In theory, the Commission can utilize Article 102 through the residual power granted in Article 105.[286] Article 105 obligates the Commission to ensure adherence to EU competition rules, granting them residual power to intervene. Specifically, Article 105 allows the Commission to scrutinize an undertaking under Article 102 or 101 of the TFEU on its own initiative or at the request of a Member State. It can therefore be argued that the Commission may use Article 105 in

[280] Case C-449/21, Opinion of advocate General Kokott, *Towercast v Autorité de la concurrence and others*, Opinion of 13 October 2022 and Case C-449/21, *TowerCast v Autorité de la concurrence,* EU:C:2023:207.

[281] Article 102 can only be applied where the undertaking concerned has established dominance on a given market.

[282] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', (Communication), OJ 2009/C 45/02, para 19.

[283] Vestager, M., *Mergers: Commission prohibits acquisition of GRAIL by Illumina,* Brussels, Press release 6 of September 2022

[284] *Intel Corp. v European Commission*, paras. 129-147.

[285] CJEU's judgment in *Michelin I,* para 57 and European Commission, OJ 2009/C 45/02, para 19.

[286] Jones, A, Sufrin, B & Dunne N, page 93

combination with Article 102 to prohibit anti-competitive practices by undertakings. However, this residual power has to this date, never been used by the Commission, and so far, nothing indicates that the Commission plans to use this residual power in this way. For this reason, Article 102 as an ex-post tool is currently limited to national authorities.

5.2.1.4 Challenges With Article 102 as an Ex-post Review Mechanism

The ex-post review process presents unique challenges for the competition authorities, particularly concerning irreversible harm that may occur prior to scrutiny under Article 102. An example of such harm could be the forced exit of competitors from the market before concentrations are scrutinized under Article 102, which illustrates the necessity of an *ex-ante* review. However, Article 102 is accompanied by the power to utilize interim measures. Nevertheless, the effectiveness of such measures relies on the fact that harmful effects are caught before causing irreversible harm to the market.

Furthermore, defining the market becomes progressively crucial in Article 102 cases since the scope is restricted to dominant undertakings. Competition authorities may face the challenge of defining the market in new economy industries, especially in the digital sectors, where markets are swiftly developing and influenced by factors beyond mere price competition.[287] For instance, one of the determining factors in the *Facebook/WhatsApp* case was that the Commission established that Facebook and WhatsApp acted in different markets.[288] However, they have instituted new methods for defining markets in these zero-price sectors.[289] To illustrate, instead of the Small but significant and non-transitory increase in price test, the small but significant non-transitory test was employed as an alternative in the *Google/Android* case.[290] Meanwhile, access to substantial data has been proposed to indicate dominance in the 'Crémer report.'[291] Therefore, it is feasible to establish market dominance even in the zero-price market of the new economy sectors.

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[287] See Montjoye, Y., Schweitzer H., Crémer, J., *Competition policy for the digital era*.

[288] Case *Facebook/ WhatsApp*; European Commission, *Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover*, Press release of 18 May 2017, <available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369>.

[289] In the Tetra Pak-case the Commission used Article 102 to fill the gap which the EUMR could not resolve in a merger where the incumbent's position would strengthen its position in the market resulting in increased barriers to entry (See Case T-51/89, *Tetra Pak Rausing SA v Commission*, EU:T:1990:41).

[290] The Android and iOS operating systems were found to be separate markets by the GC, primarily because Apple does not offer its iOS to other original equipment manufacturers. The GC determined that there is only indirect competition between the two operating systems, and that Apple lacks the necessary indirect competitive pressure to influence Google's conduct. Therefore, the users and developers would remain loyal to their respective operating systems due to switching costs and users' loyalty. See Case T-604/18, *Google and Alphabet v Commission.* EU:T:2022:541, paras 172-181.

[291] Montjoye, Y., Schweitzer H., Crémer, J., *Competition policy for the digital era,* page 49, and European Commission, 'Statistics on Merger Cases', Published 5 March 2021, available at <https://competition-policy.ec.europa.eu/mergers/statistics_en>, Accessed on 29th of January 2023.

Once an abuse of dominance has been identified under Article 102 of the TFEU, the Commission is empowered to end behavioral infringements pursuant to Article 5 of Regulation 1/2003. Nevertheless, there exists uncertainty as to how this would be practically implemented in cases related to nascent acquisitions, especially in cases that emerge following the merger and sometime after the termination of the acquired nascent firm. Can utilizing Article 5 of Regulation 1/2003 coerce an undertaking to revive and unmerge a business it has decided to eliminate, and if yes, how long after it can do so? It is apparent that the application of Article 102 in this way is also coupled with its own layer of substantial legal uncertainty.

In addition, the scope of the application of Article 102 is restricted to the dominant market players in the relevant national market. Therefore, using the Article 102 mechanism may not be efficient for investigating concentrations that could result in anti-competitive practices within the Community market. For instance, Illumina only operates in Belgium, France, Italy, and Germany;[292] therefore, the implementation of Article 102 would only have been applicable in these regions, given that the case had not been referred and given that Illumina constitutes a dominant market player nationally. Furthermore, in cases where Member States feel that the Commission will not consider their interest and where one of the undertakings concerned is a dominant player on the national market, they may opt not to refer the concentration and scrutinize it using Article 102 of the TFEU. As mentioned earlier in relation to Article 22, this could result in more parallel processes for concentrations, which violates the one-stop-shop principle.[293]

5.2.2 Concluding Remarks

In summary, Article 102 is not suitable as a replacement for the new Article 22 approach due to its limited range to dominant undertakings. However, Article 102 might be an appropriate tool to tackle incumbents' anti-competitive acquisitions of nascent firms. Although, it comes with some challenges, and further specification regarding using Article 102 as an ex-post tool in mergers is necessary in light of the *TowerCast* judgment. It also seems possible that it can be difficult to resolve such acquisition *ex-post* if the damage has already been completed beforehand. For this reason, this tool is most likely more effective when coupled with an *ex-ante* provision that will also catch nascent acquisitions.

5.3 A Targeted Approach Through Sector Specific Regulation

[292] Illumina Inc. *Illumina Fact Sheet*, Available at <https://www.illumina.com/content/dam/illmina-marketing/documents/company/illumina-at-a-glance.pdf>.
[293] See section 4.2.2.

One alternative strategy to detect and gain jurisdiction of nascent acquisitions is to focus on deals that involve specific undertakings in targeted sectors that might be at risk of being impeded by nascent acquisitions. This could be efficient given that both the Guidelines and the Commission underline the digital and pharmaceutical industries as industries where detrimental nascent acquisitions are more likely to occur. There are several different ways to implement a targeted approach. Norway currently has a system that targets specific firms that must notify all transactions.[294] Similarly, the Digital Markets Act (DMA) requires gatekeepers, dominant undertakings in the digital sector, as defined by Article 3 of the DMA, to send information regarding the acquisition to the Commission to consider it for an Article 22 referral (Article 14 of the DMA).

Another targeted approach of interest is one proposed in an article concerning killer acquisitions in the pharmaceutical market by Lundquist.[295] The proposal recommends a strategy that focuses on the transfer of R&D efforts and IP by targeting the top three dominant undertakings in the market. Specifically, the article suggests that the regulation specifically targets transactions in markets with overlapping R&D efforts. For example, pipeline-to-pipeline overlaps, marketed-to-pipeline overlaps, or in other ways, constitute potential rivals.[296]

This thesis proposes a similar approach in which the Commission incorporates specified guidelines for specific sectors of interest. For each industry, the Guidelines should clearly outline the dominant undertakings for each sector of interest. For instance, the Guidelines could target the top three dominant undertakings in a specific sector, as argued by Lundquist,[297] or refer to undertakings with specified characteristics, such as gatekeepers in the digital industry. In the Guidelines, the Commission should also specify what type of acquisitions warrant additional scrutiny in each sector. In doing so, the Commission limits its margin of discretion reasonably while also significantly limiting legal uncertainty.[298] Such Guidelines would clearly indicate what concentrations need to prepare themselves for an Article 22 reviewal. As a result, the reduction of appropriability is limited, and the type of mergers that the Commission wishes to scrutinize would be able to prepare for the possible merger process.[299] In addition to limiting the legal uncertainty for undertakings, such an approach would give the Commission the flexibility they need to prevent killer acquisitions and similar types of nascent acquisitions without having to amend the current regulation.

[294] OECD, *Start-ups, Killer Acquisitions and Merger Control*, page 46.
[295] Lundquist, B., *Killer Acquisitions and Other Forms of Anticompetitive Collaborations (Part II): A Proposal for a New Notification System*, [2021], vol 5. No. 4, European Competition and Regulatory Law Review (CoRe) pages 344-363.
[296] Lundquist, B., page 351.
[297] Ibid., page 346.
[298]CJEU's judgment in *Dansk Rorindsutri and others v Commission*, para 211.
[299] See European Commission, 'Competition policy brief', April 2016, page 2.

5.4 Voluntary Notifications

An alternative solution to remedy legal uncertainty would be a voluntary notification mechanism that enables mergers that are not subject to notification in any Member States and do not have an EU dimension to submit a voluntary notification to the Commission.[300] Several countries have adopted a voluntary approach for concentrations. In Sweden, the SCA can examine concentrations on particular grounds, which actively encourages concentrations to communicate with the authority to facilitate notification voluntarily where it is deemed appropriate.[301] Notably, self-assessment of the merger becomes increasingly essential. A case study by practitioners showed that out of around 20 voluntary notifications, one case resulted in the prohibition of the merger, and four cases resulted in parties abandoning the transaction after receiving SCA's statement of objections.[302] It has been suggested that this method provides additional legal certainty to the undertakings concerned. However, for it to be successful, a precise early identification process must be established, along with specific time limits for the voluntary mechanism.[303] Therefore, a targeted approach in combination with the Article 22 mechanism and a clearly defined early indication procedure may provide an efficient strategy to remedy the legal uncertainty for concerned parties.

To be effective, the mechanism should be similar to Article 4(5) of the EUMR, except for the requirement of being notifiable in at least three Member States. To ensure that the principle of subsidiarity is upheld, Member States could be given the ability to express their concern as described in Article 4(5) subparagraphs three and four. If these conditions are met, the merging parties would not have to go through the trouble of sending information to each Member State to make themselves known and thereby start the 15 workdays countdown. Moreover, a voluntary notification mechanism, modeled after Article 4(5), would confer exclusive power to the Commission to review the merger, preventing NCA:s from running parallel procedures with a vested interest in the merger, which would better align with the one-stop-shop principle.

5.5 Transaction-based Values

Another alternative is to introduce supplementary transaction-value-based thresholds, which could potentially provide an effective approach to reducing the gap for concentrations, including nascent firms. This proposal seems promising based on the Commission's acknowledgment that the competitive significance of Grail was demonstrated by its transaction value of USD 7.1 billion.[304] By incorporating complementary thresholds, the acquisition of nascent firms that have

[300] This has been discussed by the Commission earlier, See European Commission, SWD(2021)66, page 93.
[301] See Kar, N., and others, pages 12-13.
[302] Ibid.
[303] European Commission, SWD(2021)66, page 93.
[304] European Commission, *Daily News 20/04/2021*.

the potential to impede innovation could be effectively addressed while maintaining legal certainty. This approach may reach nascent acquisitions while maintaining legal certainty and upholding the founding principles of the EUMR, such as the one-stop shop principle.

The prospect of implementing complementary transaction-based thresholds to capture mergers under the EUMR has been a topic of discussion for the Commission in recent years. The Commission conducted an in-depth analysis utilizing Bloomberg data to explore this possibility.[305] The findings revealed that while additional mergers may be caught by complementary thresholds, implementing such thresholds would not indispensably solve the issue concerning nascent acquisitions because the value of the transaction itself does not necessarily correlate with the potential competitive impact.[306] It is, therefore, imperative to consider other aspects of a merger beyond just the transaction and turnover value when fashioning the scope of jurisdiction for the Commission in the EUMR.

Transaction-value-based thresholds have already been implemented in Austria and Germany. The number of mergers caught by these thresholds in said countries has been relatively small, [307] indicating that the overall effectiveness of this approach in capturing potentially harmful concentrations involving nascent firms is limited.

Additionally, the Commission discovered that enforcing transaction-based thresholds might pose an administrative burden on both companies and the Commission itself due to the difficulty in predicting the final transaction amount.[308] However, the Competition and Markets Authority in the UK suggested that this administrative burden could be resolved by specifying a particular date for evaluation, effectively considering the volatility of these factors.[309]

Regardless if the burden on the Commission would be too high, transaction-based values constitutes an additional burden for undertakings who have to calculate the final price. On the other hand, when evaluating company transactions, one issue is the potential for concentrations to engage in 'forum shopping.'[310] This refers to the proactiveness of undertakings concerned with setting the transaction value below any thresholds set by regulatory bodies on the national or EU level to avoid review. This behavior could ultimately lead to a decreased willingness for incumbents to offer substantial sums for nascent firms, which could have positive and negative implications for innovation. On the one hand, it may incentivize nascent firms to invest in R&D to commercialize the product themselves, resulting in more companies emerging on markets or expanding markets

[305] European Commission, SWD(2021)66, page 36.
[306] Ibid.
[307] Ibid., page 44.
[308] Transaction amounts are highly volatile due to change in share prices and varying exchange rates. See Ibid, page. 91.
[308]OECD, *Start-ups, Killer Acquisitions and Merger Control*, page 43-44.
[309] Ibid.
[310] Bushell, G., *EU Merger Regulation Reform: No Smiles from the Thresholds,* Kluwer Competition Law blog, Published October 24, 2016, available at >https://competitionlawblog.kluwercompetitionlaw.com/2016/10/24/no-smiles-from-the-threshold-eu-merger-control-reform/>.

through disruptive competition. Conversely, it may decrease the attractiveness of the sell and exit strategy for investors and entrepreneurs, leading to reduced appropriability and less synergetic mergers.

An economic analysis of this issue should be conducted to indicate whether the pros outweigh the cons. However, considering the findings in this section, this thesis concludes that transaction-based values have too little effect to be worth the risk. While the transaction-based thresholds could undoubtedly be used to decrease the gap concerning mergers, including nascent firms, to some degree, they could also potentially interrupt the crucial functions of the free market.

5.6 Chapter Conclusion

The limitation of the approaches discussed in this chapter encompasses various issues, including legal certainty and questionable effectiveness. The recent decision by the CJEU,[311] which confirm the usage of Article 102 as an ex-post mechanism on a national level, introduces additional uncertainty and risk for stakeholders involved in M&A activity on the free market. As a result, appropriability is reduced as the sell and exit strategy becomes increasingly dicey.[312] However, the possibility of examination through the utilization of Article 102 could be eliminated by implementing a voluntary notification mechanism granting the Commission exclusive authority to scrutinize voluntarily notified concentrations.

Ultimately, the thesis's final recommendation is that the Commission refine the target of the new Article 22 approach by making it sector, incumbent, and – mergers specific. This can be accomplished through an enhanced Article 22 Guidelines, which narrows down the criteria for referrals and limit the Commission's margin of discretion, thereby remedying legal uncertainty, which causes a decrease in appropriability. Currently, the Commission is focused on the digital and pharmaceutical sectors,[313] with the DMA covering major incumbent firms in the digital market. Through reference to the DMA, some of the work in defining the scope of the digital market is already done. By supplementing additional sector-specific criteria in the pharmaceutical sectors, firms in this market could also anticipate the risk of referral and hold the Commission accountable by the principle of legitimate expectations if they act outside a newly defined scope set in the Guidelines.[314] Furthermore, a procedure for an early indication should be

[311] CJEU judgment in *TowerCast*.

[312] Panetta, J., *Biocom California State on Illumina's Proposed Acquisition of Grail.*

[313] See European Commission, *Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control*, Press release of 26 March 2021
and European Commission, OJ 2021/C 113/01, para 7.

[314] See Case T-446/05, *Amann & Söhne and others v the Commission*, EU:T:2010:165 para 146: "In adopting such rules of conduct and, by publishing them, announcing that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and must not depart from those rules, on pain of being penalized itself, where appropriate, for breach of the fundamental principles of law, such as equal treatment or the protection of legitimate expectations"

included in the new Guidelines, coupled with a voluntary mechanism in the EUMR, to remedy the legal uncertainty further and to prompt an early dialogue between the Commission and concentrations that might be subject to an Article 22 referral. This could also solve the systematic issues relating to the one-stop shop principle in Section 4.2.

6 Closing Statements

To summarize this thesis, nascent acquisitions can harm dynamic competition in the new economy markets. Conventional methods utilized by the Commission were inadequate in addressing this threat, resulting in a low level of market contestability and, therefore, a decline in market innovation. The new Article 22 approach enables the Commission to consider nascent undertakings as innovative vectors that may warrant additional scrutiny, something the rigid turnover-based system could not. However, the recent Article 22 approach has several shortcomings. After considering the EU-legal and economic analysis, it is highly probable that the approach will fail to achieve its intended purpose of sustaining innovation in the new economy markets and have unfavorable effects that violate the primary principles of EU law and the EUMR due to a substantial decrease in appropriability. As a result, the thesis recommends that the Commission clarify its Guidelines by utilizing a specified and targeted approach that limits its discretionary powers and increases legal certainty. In summary, the following amendments are necessary: (1) A refashioned and specified time frame in which mergers can be scrutinized by the Commission to remedy legal uncertainty, (2) a new interpretation of 'made known' in Article 22 to remedy the incompatibility with the one-stop-shop principle, (3) a comprehensive description of the procedure for receiving an early indication to limit legal uncertainty, (4) the inclusion of a specified time period in which the Commission is allowed to accept referrals from Member States, and (5) an amendment in the EUMR which allows concentrations without an EU dimensions, and that are not notifiable in any Member States, to send in a voluntary notification under certain conditions to remedy reduce legal uncertainty and increase compatibility with the one-stop-shop principle.

Before concluding, I would like to address two aspects briefly discussed in the thesis but not directly relevant to its overall scope. One of these topics concerns the *TowerCast* judgment regarding Article 102 as an ex-post tool for National Competition Authorities (NCAs). Similar to the mechanism outlined in Article 22, the ruling in *TowerCast* and the newly interpreted scope of Article 102 in relation to concentrations have resulted in legal uncertainties for enterprises involved in such cases. This can potentially lead to similar effects observed under the new approach of Article 22. It will be intriguing to follow the development of this new tool in the future, particularly considering its potential impact on appropriability.

The secondary subject that revolves around the focus of this thesis, but is not encompassed within its direct purpose, pertains to the discretionary authority of the Commission. Should the Commission, which serves as enforcer, judge, and law marker, have the authority to extend its power of discretion as seen in the new approach to Article 22? While the authority to interpret the EU laws rests with the courts, the Commission has extensive discretionary powers under generally fashioned regulations. As such, Article 22 allows the Commission to change its practices and choose appropriate concentrations for a referral within the Article's defined limits. While Commissioner Vestager has promised that only mergers posing a significant threat to innovation and consumer welfare will be subject to scrutiny under Article 22, this assurance is contingent on her tenure as Commissioner. Just as the Commission has altered its current practice, it may choose to investigate an increased range of mergers in the future. Although the Commission requires appropriate measures to combat nascent acquisitions that promote anti-competitive behavior, it is more suitable to achieve significant changes in merger control through regulatory reforms to prevent legal uncertainties while maintaining the democratic principles on which the Union is built.

To conclude this thesis, the emergence of nascent acquisitions, particularly killer acquisitions, has sparked substantial debate surrounding the behavior of incumbents in recent years. As a result, there have been significant revisions to the interpretation of EUMR. To address the legal ambiguity that can adversely affect innovation, particularly in new economy sectors, clarification must be provided by either the Commission or the CJEU. The *Illumina/Grail* case highlights not only a change in the interpretation of Article 22 but also a shift towards expanding the discretionary power of the Commission, which raises fundamental questions about the principles of EU law and their significance in the eyes of those entrusted with their interpretation. Although the Commission has vast discretionary powers for maintaining competition, it must also bear in mind that these powers come with responsibilities. While consumer welfare should be the ultimate goal of such obligations, they should not come at the expense of the fundamental principles upon which the EU was founded.

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